85 - 1822

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CHARLES F. WILLIS, JR.,

Petitioner,

vs.

THE CLEVELAND TRUST COMPANY
n/k/a Ameritrust Company
Executor of the Estate of
Harvey S. Firestone, Jr., Deceased

ELIZABETH FIRESTONE WILLIS Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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QUESTION PRESENTED

Whether Article IV, Section 1 of the Constitution of the United States (Full Faith and Credit) is violated by an Ohio judgment based upon facts deemed admitted because of Petitioner's tardy denial, which "admitted facts" are directly contrary to the facts found by a Court of competent jurisdiction in the District of Columbia, which finding is binding through privity upon the party requesting the admissions in the Ohio proceeding.

PARTIES BELOW

All parties to the proceeding below are listed in the caption of this petition.

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OPINIONS BELOW

The opinion of the Supreme Court of Ohio, The Cleveland Trust Co. v. Willis, is reported in 20 Ohio St. 3d 66, __ N.E. 2d __ (1985). The opinion of the United States Court of Appeals for the District of Columbia Circuit, Willis v. Willis, is reported at 655 F.3d. 1333, 211 U.S. App. D.C. 103, (1981). The opinion of the United States District Court for the District of Columbia, Willis v. Willis, is reported in 30 U.C.C. Rep. Serv. 1332 (1980).

The opinion of the Summit County Ohio Courts of Appeals and Common Pleas, not reported, appear in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Ohio, affirming the decision of the Court of Appeals for Summit County, was entered on November 27, 1985. Petitioner's motion for

rehearing was denied on January 15, 1986. This petition for a Writ of Certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

ARTICLE IV.

> Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

STATEMENT OF THE CASE

Introduction

This litigation involves two contradictory judgments in the District of Columbia and Ohio involving the signatory status of Petitioner and respondent's decedent, Harvey S. Firestone, Jr. ("Mr. Firestone"), on a promissory note to the Firestone Bank of Akron ("Firestone Bank") and their respective rights to the ownership of common stock which had been deposited as collateral. Mr. Firestone was the father of Petitioner's former wife, Elizabeth Firestone Willis ("Elizabeth"). Mr. Firestone contracted to sign the note in place of his daughter.

The first action was brought by Petitioner in the United States District Court for the District of Columbia against

Elizabeth and respondent Executor. Willis v. Willis, 30 U.C.C. Rep. Serv. 1332 (1980). The District Court held that Elizabeth was not personally obligated on the note but that her father was a co-maker, and that neither were accommodation makers. The United States Court of Appeals for the District of Columbia Circuit in affirming the judgment for Elizabeth, held that her father was in fact a co-maker, but reversed the judgment against respondent Executor for lack of personal jurisdiction. Willis v. Willis, 655 F.2d 1333 (1981).

The second action was brought by respondent Executor in the Summit County Ohio Common Pleas Court against The Firestone Bank, Petitioner, and Elizabeth. Because Petitioner was tardy in filing objections to the executor's Request for Admissions, the Trial Court held that Mr.

Firestone's status as accommodation party was conclusively established by admission, contrary to the District of Columbia appellate decision, and entered judgment accordingly. This holding was affirmed by the Court of Appeals and the Supreme Court of Ohio, The Cleveland Trust Co. v. Willis, 20 Ohio St. 3d 66 (1985).

We will briefly summarize the facts and the course of the proceedings in each case and Court.

SUMMARY OF FACTS

Beginning in 1958, Petitioner and his then wife, Elizabeth Firestone Willis, borrowed money from New York banks to finance the purchase of shares in Alaska Airlines, of which Petitioner was to become president and chief executive officer. The

Alaska Airlines stock was registered in the names of Petitioner and Elizabeth as joint tenants and served as collateral for the loan. Elizabeth's shares in The Firestone Tire & Rubber Company were also deposited as collateral.

In 1964, the New York loan and the collateral were transferred to The Firestone Bank of Akron, Ohio. The loans were renewed so that by 1968 both Petitioner and Elizabeth were jointly and severally liable as co-makers in the amount of $441.339.00.

In 1969, The Firestone Bank mailed Petitioner a renewal note. At that time, Petitioner and Elizabeth had separated. Petitioner was living in Seattle, Washington, Elizabeth in the District of Columbia. Petitioner, after signing the note, mailed it to his wife's divorce counsel in the District of Columbia asking that Elizabeth sign the note and return it

to him for transmittal to the Bank. Elizabeth, without telling Petitioner, refused to co-sign the note. Instead, her counsel mailed the unsigned note to her father, Harvey Firestone in Akron, Ohio. Later Elizabeth and Mr. Firestone entered into a secret agreement by which Mr. Firestone was to sign the renewal note in Elizabeth's place, and Elizabeth was to leave her Firestone Tire & Rubber Company stock as collateral and give her father an option to purchase all her interest in Alaska Airline stock. Mr. Firestone "whited out" or erased Elizabeth's name as intended co-maker on the note and signed in her place. The Bank accepted this note without telling Charles, who did not learn about the substitution of parties until 1978.

Petitioner and Elizabeth were divorced in 1970. Mr. Firestone died in

1973 and respondent was appointed Executor of his estate.

After Mr. Firestone's death, The Firestone Bank presented a claim to respondent Executor demanding that Mr. Firestone's estate pay the note in its entirety. No demand was made by the Bank on either Petitioner or Elizabeth. After litigation in the Ohio Probate Court, the respondent paid the note.

The District of Columbia Litigation

In 1976, Petitioner brought an action for a declaratory judgment against Elizabeth in the United States District Court for the District of Columbia, asking that Court to declare the parties' respective obligations on the 1969 renewal note and their entitlement to the stock securing it. (Civil Action No. 76-1225,

United States District Court for the District of Columbia). In 1978, after he had been made a party to Summit County Probate Court proceedings to enforce payment of the note and learned for the first time that Mr. Firestone had signed the renewal note in place of Elizabeth, he added respondent Executor and The Firestone Bank as additional parties defendant in the District of Columbia litigation. The Firestone Bank was dismissed by the U.S. District Court for want of personal jurisdiction.

Petitioner claimed that he was not liable on the 1969 note because he had not consented to--indeed had no knowledge of--the substitution of makers. He argued that he had agreed to sign with his wife, not his father-in-law; hence, he was not obligated on the renewal note and was entitled to a return of his Alaska Airlines

stock. Both Elizabeth and respondent Executor contended that Elizabeth was an accommodation maker for Charles on pre-1969 notes and that Mr. Firestone was an accommodation maker on the 1969 note because he had signed in his daughter's place and thereby assumed her previous status.

The District Court held that Elizabeth was a co-maker and not an accommodation party on the pre-1969 notes, and that "with regard to the 1969 note, Elizabeth was never a party to that note" in any capacity. (Appendix p. 115). Nevertheless, it awarded contribution to Elizabeth for interest she had paid on the note, based on the intent of Petitioner that she be a co-party. (Appendix p. 97). The District Court rejected respondent Executor's claims for contribution or indemnification, finding that Harvey Firestone was not an accommodation maker but

a co-maker who had completed the instrument contrary to the authority given, and was thus "a mere interloper and he may acquire no rights against Charles after the Bank has called upon him to honor the obligation for which he volunteered." (Appendix p. 94).

On appeal, the United States Court of Appeals for the District of Columbia Circuit held that the District Court had no jurisdiction over respondent Executor under the District's long-arm statute because its decedent, Harvey Firestone had not transacted sufficient business in the District. Therefore, as to respondent Executor, the decision was reversed. The Court of Appeals, however, affirmed the District Court's holding that Elizabeth was not personally bound on the 1969 note in any capacity, and the Petitioner and Harvey Firestone "alone were the 'co-makers' of the 1969 note". The Court found that by paying

interest to protect her collateral, Elizabeth became subrogated to Harvey Firestone's right, in his capacity as co-maker, to contribution from Petitioner. (Appendix p. 83).

The Ohio Litigation

While the District of Columbia litigation between the same parties was pending in the U.S. District Court for the District of Columbia, respondent Executor brought suit against The Firestone Bank, Petitioner, and Elizabeth in the Court of Common Pleas of Summit County, Ohio on March 26, 1979 asking for possession of the collateral and a money judgment against Charles to indemnify it for the note which it had been required to pay through the Summit County Probate Court proceedings.

The Ohio litigation was suspended to allow the District of Columbia litigation to proceed. In 1981, after the U.S. Court of Appeals for the District of Columbia held that the District of Columbia Courts had no personal jurisdiction over the respondent Executor, the Ohio litigation resumed.

In May, 1983, six weeks before the scheduled trial date, respondent's Ohio counsel, pursuant to Rule 36 of the Ohio Rules of Civil Procedure, served some 50 requests for admissions on Petitioner's counsel. At that time, Charles was residing in Honolulu, Hawaii and was in ill health. Two of these requests (Nos. 28 and 32) requested admissions on points of law and fact that had been decided to the contrary by the United States District Court for the District of Columbia in the prior action between these same parties, and affirmed by

the U.S. Court of Appeals for the District of Columbia Circuit:

> "Request No. 28:
>
> Elizabeth Firestone Willis was an accommodation party on the series of notes to The Firestone Bank of Akron executed by her and Charles F. Willis, Jr. between November, 1964 and September 30, 1968.
>
> Request No. 32:
>
> Harvey S. Firestone, Jr. signed the October, 1969 renewal note as an accommodation party."

Petitioner's response to these requests for admission denying the truth to these statements was filed 11 days too late. At the onset of the trial, the trial judge struck Petitioner's responses and deemed all of the requested admissions to be true including No. 28 and 32 quoted above. To avoid a default, Petitioner moved to amend his untimely answers to permit late filing, attaching medical data to excuse his delay. This motion was denied.

Relying exclusively upon the statements that Elizabeth and Mr. Firestone were accommodation makers for Charles, which were deemed admitted solely because of the tardy denials, and which were offered in evidence over Petitioner's res judicata objections, the Trial Court refused to give effect to the prior contrary finding of the District of Columbia Courts or to take additional evidence on the status of the parties. It entered judgment against Petitioner in favor of respondent Executor and ordered that all of Petitioner's Alaska Airlines stock held as collateral by The Firestone Bank be sold to satisfy the judgment. (Appendix p. 47,48).

TREATMENT OF THE QUESTION IN THE COURTS BELOW

Court of Common Pleas

The issue of Full Faith and Credit and res judicata of the District of Columbia judgment was raised by Petitioner immediately after the trial Court struck Petitioner's responses and ordered respondent's statements of fact deemed admitted.

Copies of the decisions of the District of Columbia Courts had been offered to the trial Court in connection with cross-motions for summary judgments previously filed by Petitioner and respondent, which had been denied by the trial Court.

At the trial, Petitioner's first opportunity to raise the res judicata

argument with respect to the requests for admissions was by objecting to their being offered into evidence. Petitioner's counsel and Elizabeth's counsel both argued that the status of Elizabeth had been conclusively determined by the District of Columbia Courts. (Appendix p. 120 et seq.)

The Court of Common Pleas issued its Findings of Fact, Conclusions of Law and Judgment, finding that Harvey Firestone "as admitted was an accommodation maker to him" (Petitioner). The Court relied upon Harvey Firestone's status as accommodation party and granted judgment against Petitioner for the full amount of the payments the Executor had made, plus interest, not the one-half it would have been entitled to receive as co-maker. The total judgment was $858,958.13.

Respondent's counsel admitted the

applicability of res judicata and full faith and credit.

> "MR. KERPER: Your Honor, our position is, of course, that everything he says maybe would have been proper if they had timely--they had a right to timely respond, and they didn't do it; and once that happens, the rule says any matter admitted under this rule is conclusively established."

Court of Appeals for Summit County

The judgment of the Court of Common Pleas was appealed to the Court of Appeals for Summit County. In his Brief and Assignments of Errors, Petitioner raised the issue at page 30:

> "Moreover, Elizabeth herself was not an accommodation party for Charles; she was a co-maker. Judge Richey specifically decided (Opinion, Findings of Fact and Conclusions of Law, pp. 17-21; App. 70-74) that Elizabeth as a co-maker with Charles received a pecuniary benefit in the form of

> the purchase of Alaska Airlines stock. Judge Richey also found that Mr. Firestone, who substituted himself for his daughter, stood in no better position than Elizabeth whom he replaced. Furthermore, the Court of Appeals for the District of Columbia implicitly found that Elizabeth, before 1969, had been a co-maker with Charles. Therefore it has already been adjudicated in a judgment binding upon both Charles and Elizabeth that Elizabeth was a co-maker and not an accommodation maker on all of the notes at The Firestone Bank. (See Elizabeth's answer to Plaintiff's request for Admission No. 28.) Because Elizabeth was not an accommodation party (maker), Mr. Firestone cannot be an accommodation party."

Respondent in its answer brief in the Ohio Court of Appeals argued (Brief for Plaintiff-Appellee, The Cleveland Trust Company, pp. 14-15):

> "Mr. Willis failed to present any evidence to the Trial Court, either in connection with his attempt to amend his admissions or at the trial on the merits, that indicated that Mrs. Willis and Mr. Firestone were not, in fact, accommodation parties on those notes.

> Mr. Firestone's status as an accommodation party on the 1969 note was dependent upon Mrs. Willis's status as an accommodation party on earlier notes to The Firestone Bank in the same series."

Thus, respondent conceded for the first time that it claimed accommodation status for Mr. Firestone through Elizabeth, that is, that Mr. Firestone could not stand on his own feet. Petitioner, therefore, again raised the issue of res judicata in its reply brief (Reply Brief, of Defendant-Appellee, Charles F. Willis, Jr., pp. 10-11):

> Moreover, as conceded by the Executor in its brief (p. 15), Mr. Firestone's claims arise through his agreement with Elizabeth "to assume the liability of Willis on the 1969 renewal note" (Stock Option Agreement). Thus, plaintiff-appellee admits that Mr. Firestone's status depends upon Elizabeth's status. Elizabeth has been adjudicated to have been a co-maker, not an accommodation maker; therefore, Mr. Firestone cannot be an accommodation maker, because he claims to stand in her

> shoes. (Citing Trautwein v. Songenfrei, 58 Ohio St. 2d 493 (1979). According to Trautwein, plaintiff-appellee, is estopped from relitigating the issue of her status in the Summit County Common Pleas Court. Even though the District of Columbia had no jurisdiction over the Executor, it clearly had jurisdiction over Elizabeth. Therefore, because Elizabeth has been conclusively determined to be a co-maker, that issue cannot be relitigated. Under Civil Rule 36, requests for admissions could never have been intended to be used for the purpose of impeaching binding and conclusive judgments which have decided issues of law, or fact and law, by which the requesting party or a party in privity with him is bound."

The Court of Appeals upheld the lower Court decision rejecting the proffered denials of the requested admissions (Appendix p. 20-25) but did not address the question of Full Faith and Credit or res judicata.

Supreme Court of Ohio

In his Memorandum in Support of Claimed Jurisdiction in the Ohio Supreme Court, Petitioner argued (Proposition of Law No. 1) that the admissions violated res judicata and Full Faith and Credit:

> "When a party, or a party in privity, to final judgment of another state, has offered into evidence, over objection, Civil Rule 36 admissions of law and fact that are contrary to the judgment, the admissions under res judicata and full faith and credit (Constitution of the United States, Article IV, Section 1) cannot be used to collaterally attack the binding judgment."

Petitioner carried his res judicata and Full Faith and Credit argument into his brief on the merits (Brief of Defendant-Appellant, Charles F. Willis, Jr., p. 11):

> "Request No. 28 precluded Charles from showing that Elizabeth was not an accommodation party on the notes executed prior to 1969. That issue had been conclusively determined in the federal proceedings, and was entitled to full faith and credit under the United States Constitution, and the Supremacy Clause of that Constitution. Yet, the major premise and issues litigated by The Cleveland Trust Co. was based on the proposition that Elizabeth was an accommodation party on the pre-1969 notes, and that Harvey, being in privity and standing in her shoes, derived through her the status of an accommodation party on the 1969 note."

Respondent argued in its answer brief that privity did not apply, and Petitioner reasserted Full Faith and Credit in his reply brief.

The Supreme Court of Ohio in The Cleveland Trust Co. v. Willis, 20 Ohio St. 3d 66 (1985) held that Charles' dilatory response to respondent's requests for admissions resulted in a conclusive

admission that both Elizabeth and Mr. Firestone were accommodation makers for Petitioner. The Supreme Court of Ohio did not discuss Petitioner's Full Faith and Credit argument nor did it mention the District of Columbia judgments. In its motion for rehearing, Petitioner again reasserted his contentions that modern discovery techniques should not be used to circumvent Full Faith and Credit:

> "Request number 28, that Elizabeth Willis was an accommodation party on the series of pre-1969 notes was impossible. Mrs. Willis had been determined by a judgment in the District of Columbia to have been a co-maker. This decision was res judicata. Request number 32, that Mr. Firestone had signed the 1969 note as an accommodation party, was likewise impossible because Mr. Firestone had contracted to sign in Elizabeth's place and stood in her shoes. Charles had no reason to believe that these two requests for admissions could possibly be used against him because they violated res judicata.

> Modern discovery techniques should not be used to circumvent Full Faith and Credit."

The Supreme Court of Ohio denied rehearing without Comment (Appendix p. 14).

REASONS FOR GRANTING THE WRIT

Under Full Faith and Credit (Article IV, Section 1), the doctrine of res judicata becomes a part of Federal constitutional law.

> "This Court has consistently recognized that, in order to fulfill this constitutional mandate, 'the judgment of a state court should have the same credit, validity and effect, in every other Court of the United States, which it had in the state where it was pronounced' Hampton v. McConnel, 3 Wheat 234, 235, 4 L. Ed. 378(1818) (Marshall, C.J.); Riley v. New York Trust Co., (315 U.S. 343) at 353, 86 L. Ed. 885, 62 S. Ct. 608."
>
> Underwriters National Assurance Company v. North Carolina Life and Accident and Health Insurance Guaranty Association, et al, 455 U.S. 691, 71 L. Ed. 2d 558, 102 S. Ct. 1357 (1982).

See also, Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 64 S. Ct. 208, 88 L. Ed. 149 (1943)

A judgment of a Court of competent jurisdiction in the District of Columbia is entitled to the same res judicata effect in Ohio as it has in the District of Columbia. The application of that doctrine in the District of Columbia was best expressed by the United States Court of Appeals for the District of Columbia Circuit in Jefferson School of Social Science v. Subversive Activities Control Board, 331 F.2d 76, 118 U.S. App. D.C. 2 (1963):

> "(The doctrine of res judicata) is a rule of judicial administration the purpose of which "is to secure the peace and repose of society by the settlement of matters capable of judicial determination" as described at length by the Supreme Court in the County of Sac case (Cromwell v. County of Sac, 94 U.S. 351, 52-53, 24 L.Ed. 195 (1876)), the doctrine has two rules of application: A judgment upon the merits constitutes an

> absolute bar to a subsequent action upon the same claim between the same parties or those in privity with them; and, if a second action between the same parties (or those in privity with them) is upon a different claim, the prior judgment operates as an estoppel as to those matters in issue upon the determination of which the prior finding was rendered. In any event the doctrine applies not only to the actual parties to the first litigation but also to those persons in privity with them. The term "privity" is an elusive concept, without any precise definition of general applicability. It is not necessary for us to explore all its subtleties here. It is sufficient that the word designates a person so identified in interest with a party to the former litigation that he represents precisely the same legal right in respect to the subject matter involved."

See also, Blonder-Tongue v. University Foundation, 402 U.S. 313, 321 (1971)

Applying these standards to the present litigation it is clear that Harvey Firestone (and his representative, the

respondent Executor) were "in privity" with daughter Elizabeth. After a full trial in which Petitioner, Elizabeth and Harvey's Executor participated most actively, the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit found that Elizabeth was not a party to the 1969 note, but that Harvey Firestone was a co-maker. The Court of Appeals further found that Elizabeth, by paying the interest on the note, became subrogated to Harvey's right as a co-maker to seek contribution from Petitioner Charles Willis. There could not be a clearer identity of interest.

While the District of Columbia Courts resolved the dispute between Charles and Elizabeth, the Court of Appeals found itself without the requisite personal

jurisdiction to adjudicate the rights of Charles Willis and Harvey Firestone's Executor arising out of the same transaction. That contest was shifted to the State Courts of Ohio, with the same contestants. In the Ohio Courts Harvey's Executors acknowledged that under the contract by which he agreed to take his daughter's place on the 1969 renewal note Harvey's status on the 1969 note was the same as Elizabeth's status on the 1968 and prior year's notes--that Harvey's status was dependent upon Elizabeth's status. Again the "privity" was clear and conceded. Under Ohio law, as well as District of Columbia law, the Executor was in "privity" with Elizabeth and bound by res judicata. Trautwein v. Songenfrei, 58 Ohio St. 2d 493.

Although being fully conversant with the District of Columbia judgments, the

respondent Executor served requests for admission in Ohio asking Petitioner to admit facts directly contrary to those which the District of Columbia Courts had determined. Because of illness and distance, Petitioner was late in filing his denials. The Ohio Trial Court refused to permit late filing of Petitioner's response, declared those "facts", directly contrary to the findings of fact contained in the District of Columbia judgments, to be admitted, i.e. conceded, for all purposes, and proceeded to enter judgment on the basis of those "facts".

This could never have happened in the District of Columbia. Would any trial judge there completely disregard the finding of his appellate superiors and find the facts opposite to their mandate, in a case arising out of the same factual situation

between parties clearly in privity? To ask the question begs the answer.

The U. S. Court of Appeals for the District of Columbia had finally determined the status of all the parties on the note. The only open question was the respective rights of Petitioner and respondent Executor to contribution or to release, and the disposition of the collateral, under the unique circumstances of this case. That portion of the District of Columbia judgment had been vacated for lack of personal jurisdiction over Harvey's Executor. The rest was res judicata.

Under the Full Faith and Credit Clause the Court of Common Pleas of Summit County, Ohio was required to give the same effect to the District of Columbia judgment as would a District of Columbia Court. A judgment is a judgment, and cannot be

altered, amended or diluted by an apparent "admission" to the contrary by a litigant in a subsequent proceeding. That litigant cannot vacate or rescind the judgment. Only the Court which issued it, or a Court superior to it, may do that, and as long as has not been vacated, rescinded or amended, it must be honored.

This is an important principal of Federal law which should be clarified by this Court. The entitlement of a judgment of a Court of competent jurisdiction to Full Faith and Credit by the Court of a sister state should not be defeated by an unwary answer to discovery questions, or a tardy response to requests for admissions. The Trial Court should not thereupon be entitled to disregard the prior judgment, act as if it had never been entered, and take contrary facts as conceded for purposes of the

subsequent proceeding. This is a principle which has never been clearly elucidated by this Court, and deserves to be announced.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF OHIO

CLEVELAND TRUST COMPANY n.k.a. AMERITRUST COMPANY, EXECUTOR	:	
Appellee	:	No. 84-1766
v.	:	Decided
CHARLES F. WILLIS, JR.,	:	November 27, 1985
Appellant	:	

Because the extended series of financial transactions and the lengthy history of this litigation are explained in the lower courts' decisions, we will discuss briefly only those facts which form the basis for this appeal.

In this case appellant, Charles F. Willis, Jr. ("Charles"), appeals from the court of appeals' decision affirming the court of common pleas' determination that Charles must indemnify the estate of Harvey S. Firestone, Jr. ("Harvey") for payments made by the estate on a promissory note that Charles and Harvey both signed in 1969.

On February 15, 1983, the Cleveland Trust Company, n.k.a. Ameritrust Company ("Cleveland Trust"), as Executor of the Estate of Harvey S. Firestone, Jr., filed an amended complaint against Charles F. Willis, Jr. and Elizabeth Firestone Willis ("Elizabeth"), Harvey's daughter and formerly Charles' wife, for possession of securities owned by Charles and Elizabeth and held as collateral by the Firestone Bank, n.k.a. Bank One of Akron, NA ("Firestone), for payment of the 1969 note. Firestone deposited the securities with the trial court. Cleveland Trust also sought indemnification from Charles.

The 1969 note was the last in a series of notes which Charles and Elizabeth had signed principally to finance Charles' business ventures. Harvey co-signed the last note to protect Elizabeth's financial

resources. Charles was unaware that Harvey, instead of Elizabeth, had co-signed the note. After Harvey's death, Firestone presented the 1969 note to Harvey's estate for payment. The estate paid the balance due on the note pursuant to an order from the Summit County Probate Court. Charles contended that Harvey signed the 1969 note as a co-maker rather than as an accommodation party, and therefore Charles was not required to indemnify Harvey's estate.

The Court of Common Pleas of Summit County determined that the signatory status of the parties was conclusively established by Cleveland Trust's requests for admissions. The requests were served on Charles by mail on May 16, 1983 and required a response "within twenty-eight (28) days." On June 27, 1983, the first day of trial,

Charles attempted to file his response, but the court refused permission. The requests that established Charles as maker of the note and Harvey as an accommodation party were deemed admitted. The common pleas court granted Cleveland Trust possession of the collateral for purposes of sale and judgment against Charles for the balance of the note. On appeal the court of appeals affirmed the decision of the common pleas court as to Charles.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Per Curiam. The issue raised by this appeal is whether the trial court correctly ruled that the signatory status of the parties was conclusively established by Cleveland Trust's requests for admissions. We hold that the trial court was correct in that ruling.

Civ. R. 36 requires that when requests for admissions are filed by a party, the opposing party must timely respond either by objection or answer. Failure to respond at all to the requests will result in the requests becoming admissions. Under compelling circumstances, the court may allow untimely replies to avoid the admissions.

In the instant case, Charles did not respond to the requests for admissions until the date of trial, forty-two days after service. The requests designated a period of twenty-eight days within which Charles was to respond. When Charles failed to answer the requests, the admissions became facts of record which the court must recognize.

A request for admission can be used to establish a fact, even if it goes to

the heart of the case. This is in accord with the purpose of the request to admit--to resolve potentially disputed issues and thus to expedite the trial. See St. Paul Fire & Marine Ins. Co. v. Battle (1975), 44 Ohio App. 2d 261, 269 [73 O.O.2d 291].

Any matter admitted under Civ. R. 36 is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Civ. R. 36(B). The court may permit the withdrawal if it will aid in presenting the merits of the case and the party who obtained the admission fails to satisfy the court that withdrawal will prejudice him in maintaining his action. Balson v. Dodds (1980), 62 Ohio St. 2d 287 [16 O.O. 3d 329], paragraph two of the syllabus. This provision emphasizes the importance of having the action resolved on the merits, while at the same time

assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice.

In this case Charles failed to justify his dilatory response to the requests. One appeal Charles suggests that illness prevented his timely response. However, Charles did not move for a protective order or otherwise request relief from the duty of responding to these requests for admissions. Extensions of time may always be asked for and are usually granted on a showing of good cause if timely made under the Civil Rules. In such circumstances we do not see how Charles' illness presented a substantial reason for not responding earlier.

The most emphatic argument Charles now makes is that permission to withdraw and amend his admissions on the first day of

trial would not have prejudiced Cleveland Trust in maintaining its action. We disagree. Charles did not cooperate with discovery requests and defied court orders directing him to give his deposition. Because of this conduct Cleveland Trust relied on the requests for admissions as proof of potentially disputed issues. On the first day of trial Charles sought to file his untimely response to the requests for admissions. To permit filing of Charles' response not only would have prejudiced Cleveland Trust's pursuit of its remedy and entailed further delay, but it would have put a premium upon lack of diligence. The record discloses plain failure to respond to the requests without justification for the delay. The trial court did not abuse its discretion by denying Charles' motion to amend.

Although Charles admitted to the trial court that his response to the requests was late, he now argues differently. Charles contends that the instruction with respect to the response time for the requests was improper and that a proper instruction would have read "within thirty-two (32) days." Charles did not raise this argument in the trial court and we need not address it here. Nevertheless, we have examined Charles' argument and find it to be without merit.

Charles primarily relies upon dictum in a municipal court opinion as authority for his contention. Buckeye Union Ins. Co. v. McGraw (1980), 64 Ohio Misc. 61 [18 O.O 3d 322]. See, also, Buckeye Union Ins. Co. v. Regional Transit Auth. (1983), 14 Ohio Misc. 2d 11.

In Buckeye Union Ins. Co. v.

McGraw, supra, the court stated that the minimum time prescribed by the rules for response to requests to admit which are served by mail is thirty-two days. The court calculated the minimum prescribed time by adding the twenty-eight days provided for in Civ. R. 36(A) to the additional three days provided for in Civ. R. 6(E) when notice is received by mail and then adding a day based on its interpretation of the preposition "within" as used in Civ. R. 36(A). The court stated that if the instruction with respect to the response time for requests to admit fails to give the minimum prescribed time period the party served may ignore the requests.

We disagree with the municipal court's interpretation and construction of the rules. Civ. R. 36(A) states that responses are due "within a period

designated in the request, not less than twenty-eight days." A designated period of twenty-eight days satisfies the requirement of the rule.

Civ. R. 6(E) adds three days to a prescribed period of time if the party who must perform a duty receives notice by mail. There is no requirement that the three days be incorporated into the period designated in the notice.

Based on the foregoing we hold the trial court correctly ruled that Cleveland Trust's requests for admissions were admitted. These admissions are dispositive of the appeal. The judgment of the court of appeals is affirmed as the Charles.[1]

CELEBREZZE, C.J., SWEENEY, LOCHER, HOLMES, C. BROWN, DOUGLAS and WRIGHT, J.J., concur.

1/ Elizabeth did not file a notice of

appeal in this court. Nevertheless, in a brief styled "Brief of Defendant-Appellee, Elizabeth Firestone Willis," Elizabeth presents a proposition of law and requests this court to reverse the court of appeals' judgment against her, Elizabeth's contention is not properly before us and we do not consider it on appeal.

APPENDIX B

STATE OF OHIO))ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT	
THE CLEVELAND TRUST COMPANY Executor of the Estate of Harvey S. Firestone, Jr., Deceased Plaintiff-Appellee Cross-Appellant v. THE FIRESTONE BANK Defendant and ELIZABETH FIRESTONE WILLIS and CHARLES WILLIS Defendants-Appellants Cross-Appellees	C.A. NOS.	11595 11599 APPEAL FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT OF SUMMIT, OHIO CASE NO. CV7930793

DECISION AND JOURNAL ENTRY

Dated: September 27, 1984

These causes were heard June 25, 1984, upon the record in the trial court, including the transcript of proceedings, and the briefs. They were argued by counsel for

the parties and submitted to the court. We have reviewed each assignment of error and make the following disposition:

BAIRD, P. J.

Plaintiff in this action is the executor of the estate of Harvey S. Firestone, Jr. Plaintiff brought this action for possession of collateral held by the Firestone Bank. Also named as parties defendant were Mr. Firestone's daughter, Elizabeth Firestone Willis, and her former husband, Charles F. Willis, Jr. (Mr. and Mrs. Willis were divorced on January 29, 1970). During the course of the Willis's marriage they borrowed various sums of money. This controversy centers around the renewal of a $441,339 loan from Firestone Bank. This loan was initially obtained in 1964, in the amount of $391,339, and the

proceeds were used to pay off another loan. Firestone Bank received a note for the amount of the loan signed by Mr. and Mrs. Willis. This note was secured by stock in Alaska Airlines, of which Mr. Willis was president, and stock in Firestone Tire & Rubber Company. The note to Firestone Bank was renewed several times, and in 1967, another $50,000 was borrowed. (Various changes and substitutions in the collateral were also made during the course of the loan).

In October, 1969, Firestone Bank prepared a renewal note for $441,339 and sent it to Mr. Willis. Mr. Willis signed the note and forwarded the note to Mrs. Willis. Mrs. Willis did not sign the note. Unknown to Mr. Willis, Mr. Firestone signed the note instead, and forwarded it to the Firestone Bank. Pursuant to a written

agreement, Mrs. Willis gave Mr. Firestone a note for $220,500 and an option to purchase Mrs. Willis's interest in the Alaska Airlines stock, owned jointly with her husband, for $10 a share. Mrs. Willis also agreed to leave her Firestone stock with the Firestone Bank as collateral for the loan and agreed not to dispose of her Alaska Airlines stock.

Mr. Firestone died in 1973. Firestone Bank sent a renewal note to Mr. Willis for his and Mrs. Willis's signatures. Mr. Willis refused to sign the renewal note, and Firestone Bank made a claim against Mr. Firestone's estate for the full amount of the note plus interest. The Summit County Probate Court ordered plaintiff, as executor, to pay the note. After paying the note, plaintiff brought this action to secure possession of the collateral in the hands of the Firestone Bank. In addition to

the issues raised in this action, various other questions between Mr. and Mrs. Willis involving this transaction were resolved in federal court, Willis v. Willis (C.A.D.C., 1981), 655 F. 2d 1333, and on September 10, 1982, plaintiff was awarded judgment against Mrs. Willis on her note for $220,500 in Summit County Common Pleas Court.

After a trial without a jury the lower court determined that Mr. Firestone had signed as an accommodation maker, and that the substitution of Mr. Firestone for Mrs. Willis did not operate to discharge Mr. Willis on the note. The court rendered judgment against Mr. Willis in the amount of $858,958.13, and determined that the $220,500 owed on the note by Mrs. Willis was a part of this total debt. The trial court ordered the following stock, held by the court, transferred to plaintiff for sale:

STOCK	TYPE OF OWNERSHIP	NO. OF SHARES
a. Alaska Airlines, all common stock.	Jointly held by Charles F. Willis, Jr. and Elizabeth Firestone Willis	37,400
b. Firestone Tire & Rubber Co., all common stock.	Jointly held by Charles F. Willis, Jr. and Elizabeth Firestone Willis	3,992
c. Firestone Tire & Rubber Co., all common stock.	Solely owned by Elizabeth Firestone Willis	20,500

Plaintiff, Mr. Willis, and Mrs. Willis all appeal.

MR. WILLIS'S ASSIGNMENT OF ERROR 1

> "The trial court erred to defendant Charles F. Willis, Jr.'s prejudice by denying him his constitutional and statutory right to trial by jury."

The trial court concluded that the return of the collateral prayed for in plaintiff's complaint was a matter of equity and not subject to a trial by jury. Mr. Willis argues that in fact this was an action to recover specific property and was triable to a jury under R.C. 2311.04. As

Mr. Willis points out, the recovery of the collateral in this case is a two-step process which requires the plaintiff to first demonstrate the right to be subrogated to the rights of the creditor in the securities held by the latter, and second to demonstrate that the security may be enforced against the principal. Zuellig v. Hemerlie (1899), 60 Ohio St. 27. As the Zuellig court pointed out, if the right of subrogation is not established, the action fails and no relief can be granted. Mr. Willis agrees, in line with the court in Zuellig, that subrogation is equitable rather than legal in nature. Where it is necessary to first determine whether the plaintiff is entitled to equitable relief before legal redress may be granted, the action is, in its essential character, equitable. Nordin v. Coulton (1943), 142 Ohio St. 277. We find no error, therefore, in trying the complaint to the court.

Mr. Willis also argues that his counterclaim raised legal issues which would have precluded plaintiff's recovery, and that his counterclaim in effect converted the action into one triable to a jury. Mr. Willis's claims of fraud against Mr. Firestone go to whether the security may be enforced against Mr. Willis. This counterclaim does not alter the overall nature of the original action and we find no abuse of discretion in denying Mr. Willis's demand for a jury trial. The Huntington National Bank v. Heritage Investment Group (Oct. 5, 1983), Medina App. No. 1245, unreported. Accordingly we overrule this assignment of error.

MR. WILLIS'S ASSIGNMENT OF ERROR 2

"The court erred and abused its judicial discretion in striking Charles F. Willis, Jr.'s untimely filed answers to plaintiff's requests for admissions and in overruling his motion for reconsideration and for leave to amend his admissions to permit late filing."

Mr. Willis concedes that he failed to timely file his answers to plaintiff's request for admission. Pursuant to Civ. R. 36(A), when Mr. Willis failed to timely answer the requests were admitted. Balson v. Dodds (1980), 62 Ohio St. 2d 287. The proper procedure for withdrawing or amending admissions is by motion pursuant to Civ. R. 36(B), and we find that the court did not abuse its discretion in striking Mr. Willis's untimely answer. Mr. Willis subsequently moved to amend his answer to plaintiff's request for admissions, and the trial court denied the motion. Mr. Willis claims that this denial was error. Civ. R. 36(B) provides:

> "Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing modification of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the

> admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding."

As we have already noted, when Mr. Willis failed to answer the requests for admission, he admitted them pursuant to this rule. The rule places his conscious choice to ignore plaintiff's request on the same plane as the conscious choice to admit them.

The decision to allow Mr. Willis to withdraw or amend his admissions lies within the sound discretion of the trial court. In exercising this discretion the court must balance the importance of having the issues decided on their merits with the desirability of allowing the parties to rely on admissions in the preparation of trial. Federal Advisory Committee Note Rule 36. We

also feel that it is important to keep the purpose of this rule in sight when considering whether to allow a party to amend or withdraw admissions: Civ. R. 36 provides a mechanism by which potentially disputed issues may be expeditiously resolved before trial, thereby expediting proof of these issues at trial. St. Paul Fire & Marine Ins. Co. v. Battle (1975), 44 Ohio App. 2d 261. To this end we do not think it unreasonable to expect the moving party to demonstrate that justice will be better served by allowing the amendment, to offer a justification for the need to amend, or to explain the failure to properly respond to the requests for admissions. K. R. Jones v. Employers Ins. of Wausau (N.D. Ga., 1982) 96 F.R.D. 227.

In this case the complaint was filed on March 26, 1979, and the trial commenced on June 27, 1983. All parties engaged in

extensive discovery, but it appears that Mr. Willis consistently sought to thwart plaintiff's legitimate efforts at discovery. Mr. Willis failed not only to answer plaintiff's requests for admissions but failed to appear for deposition and sought to delay trial. Mr. Willis now presents various medical reasons for his failure to engage in discovery, but presented none of these reasons to the trial court in a proper and timely fashion. When Mr. Willis did finally seek to withdraw or amend his admissions, he did so on the day of trial. If granted, the amendment would have caused plaintiff to suffer the greatest possible prejudice in reliance upon the admissions. We find the court did not abuse its discretion in denying Mr. Willis's motion to amend his admissions.

Mr. Willis also argues that two requests in particular were not the proper

subject of admissions. These requests involve whether Mrs. Willis and Mr. Firestone were accommodation parties on notes to the Firestone Bank. Not only did Mr. Willis fail to properly object to the requests but the questions were proper. We find this argument to be without merit. Accordingly, we overrule this assignment of error.

MR. WILLIS'S ASSIGNMENT OF ERROR 3

> "The trial court erred in exercising in personam jurisdiction over Charles F. Willis, Jr., a non-resident of Ohio, by entering a money judgment against him."

The thrust of Mr. Willis's argument is that he transacted no business in Ohio with the Firestone Bank or with Mr. Firestone because Mr. Willis did not personally return the note to the Firestone Bank. Mr. Willis concedes that if he had delivered the note to the Bank he would have transacted business in Ohio and would be subject to

personal jurisdiction under Civ. R. 4.3. In determining whether the business transacted in Ohio is sufficient to support personal jurisdiction the critical issue is whether it is fair and reasonable for the defendant to appear and defend the action in an Ohio court. Wainscott v. St. Louis - San Francisco Ry. Co. (1976), 47 Ohio St. 2d 133. In this case Mr. Willis borrowed $391,339 from the Firestone Bank in November, 1964. Subsequent to 1964, Mr. Willis executed a series of renewal notes for the loan from the Firestone Bank and delivered those to the Bank. During June, 1967, Mr. Willis borrowed an additional $50,000 from the Firestone Bank, bringing his total indebtedness to $441,339. The Firestone Bank was an Ohio banking corporation with its principal place of business in Akron, Ohio. The instant litigation is aimed at resolving the

obligations arising out of the loans from the notes delivered to the Firestone Bank. Based on the guidelines established in Civ. R. 4.3 and Wainscott, supra, we conclude that the quality and nature of Mr. Willis's activities are sufficient to require him to defend the present suit in Ohio. See, Barile v. Univ. of Virginia (1981), 2 Ohio App. 3d 233. Accordingly, we overrule this assignment of error.

MR. WILLIS'S ASSIGNMENT OF ERROR 4

> "The trial court's journal entry ordering Charles F. Willis, Jr.'s interest in shares of Alaska Airlines, Inc. and Firestone Tire & Rubber Company common stock to be sold to satisfy a debt of Harvey S. Firestone, Jr. to The Firestone Bank of Akron and entering a money judgment against Charles F. Willis, Jr. is contrary to law and against the manifest weight of the evidence."

In his brief, Mr. Willis presents the following "arguments" under this assignment of error.

"1. The 1969 promissory note was intended to be either a joint obligation or a joint and several obligation of both Charles and Elizabeth; therefore, when the note was completed other than as authorized, it could not be enforced.

"2. Charles F. Willis, Jr. was not a maker of the 1969 note.

"3. Elizabeth Willis was not an accommodation maker; therefore, Harvey S. Firestone, Jr. cannot be an accommodation maker.

"4. When the 1968 promissory note was marked 'Paid by Renewal,' there was no longer any valid pledge of any stock owned by either Charles F. Willis, Jr. and/or Elizabeth Firestone Willis to The Firestone Bank; therefore, the plaintiff could acquire no security interest in their stock.

"5. Under R.C. §1303.51(E), the only right of subrogation is upon the note; therefore, when the executor withdrew the note from evidence, it abandoned any claim of subrogation on the instrument.

"6. Even if the plaintiff is not claiming a right of recourse on the instrument, it has no rights against Charles F. Willis, Jr. under any principles of law and equity because Mr. Firestone was a volunteer who signed the 1969 note to protect the interest of his

daughter Elizabeth and not to protect an interest of his own.

"7. Assuming arguendo that Charles F. Willis, Jr. was contractually bound on the 1969 note, he was discharged when the 1969 note was fraudulently and materially altered by The Firestone Bank and Mr. Firestone."

At the outset we observe that the note was in fact admitted into evidence, and reject the fifth argument. We also observe that Mr. Willis admitted that he was the maker of the 1969 note and that Mrs. Willis and Mr. Firestone were accommodation makers on the notes that they had signed. Accordingly, we reject the first, second, third and sixth arguments.

In his seventh argument Mr. Willis claims he is entitled to discharge pursuant to R.C. 1303.43 because the note was materially and fraudlently altered. Mr. Willis's argument is based on the proposition that the note was incomplete when he signed it, and that it was completed

other than as authorized. R.C. 1303.14 applies to notes which are signed when they are incomplete in any necessary respect. As used in R.C. 1303.14, necessary respect means necessary to a complete instrument. R.C. 1303.14 comment 2. Even though Mr. Willis intended that another party sign the note, the note was complete as to him when he signed it. Parrish v. Terre Haute Savings Bank (Ind. App., 1982), 431 N.E. 2d 132. Even assuming that the note was incomplete in a necessary respect and was completed other than as authorized so as to amount to an alteration, the holder did not alter the note so as to discharge the maker pursuant to R.C. 1303.43(B)(1). In addition, the substitution of Mr. Firestone as an accommodation maker in no way increased the obligation of Mr. Willis as the principal maker. Hutcheson v. Herron (Ill. App., 1970), 266 N.E. 2d 449; R.C.

1303.43 comment 2. Finally, the trial court concluded that there was no showing of fraud such as would discharge Mr. Willis on his note. The record supports this finding and we reject argument seven.

In his fourth argument Mr. Willis claims that there was no valid pledge of stock since neither he nor Mrs. Willis were parties to the 1969 note. We will reserve the question of Mrs. Willis's stock for the discussion of her appeal. The key to this argument as to Mr. Willis is that he was not the maker of the 1969 note. As discussed above, Mr. Willis admitted he was the maker of the note. We reject this argument and overrule this assignment of error.

MR. WILLIS'S ASSIGNMENT OF ERROR 5

"The trial court erred in imposing sanctions on Charles F. Willis, Jr. because of his failure to appear at depositions and pre-trials scheduled for June 8, and June 15, 1983."

Mr. Willis argues that it was an abuse of discretion for the court to impose sanctions on him for failing to appear at his deposition. Mr. Willis argues that he was unable to travel to Akron, for medical reasons, and that his absence was therefore justified. The record reflects that Mr. Willis did not inform the court of his medical difficulties prior to his failure to appear. By failing to secure an appropriate continuance, Mr. Willis compelled counsel for all parties to prepare for and attend the scheduled deposition even though he had no intention of doing so himself. We see no abuse of discretion in ordering Mr. Willis to pay the expenses incurred by the parties because of his conduct. Accordingly, we overrule this assignment of error.

MRS. WILLIS'S ASSIGNMENT OF ERROR

"The trial court committed prejudicial error by ordering stock owned by defendant-appellant Elizabeth Firestone Willis to be transferred to plaintiff

Cleveland Trust for sale to satisfy plaintiff's judgment against defendant-appellant Charles F. Willis, Jr."

CLEVELAND TRUST ASSIGNMENT OF ERROR

"The trial court erred by reducing the amount of Cleveland Trust's recovery on defendant Charles Willis's promissory note of September 30, 1969 by an amount equal to Cleveland Trust's previous judgment in a separate proceeding on a separate promissory note signed by Elizabeth Firestone Willis."

The trial court ordered all of the stock pledged as collateral sold, and ordered that:

"***from the proceeds of sale, the total debt owed to plaintiff by Charles F. Willis, Jr. and Elizabeth Firestone Willis shall be satisfied. Thereafter, the balance of the proceeds from the sale of said stock shall be shared by Charles F. Willis, Jr. and Elizabeth Firestone Willis in accordance with their relative ownership of the stock at the time it was pledged as security for the note, as applied to the sale price of the stock currently."

As an accommodation party Mr. Firestone stood in the position of a surety for Mr. Willis, the principal debtor. R.C. 1303.51 comment 1. Because Mrs. Willis furnished collateral to secure the debt, she was also

a surety. Robinson v. Boyd (1899), 60 Ohio St. 57. The issue is whether Mr. Firestone and Mrs. Willis were co-sureties. The crucial test in this regard is whether the parties have a common liability upon the same obligation. Assets Realization Co. v. American Bonding Co. of Baltimore (1913), 88 Ohio St. 216; Robinson v. Boyd, supra. By virtue of Mr. Firestone's signature on the note and the extent of the collateral pledged by Mrs. Willis, we conclude that they bore a common burden on the same obligation. Normally, this would make Mr. Firestone and Mrs. Willis co-sureties with the right of contribution. Restatement of the Law, Security (1941) 400, Section 144. Plaintiff and Mrs. Willis both argue, however, that the normal rules of contribution were varied by the terms of the agreement between Mr. Firestone and Mrs. Willis. Plaintiff argues that Mrs. Willis

agreed to indemnify Mr. Firestone for any loss he suffered; Mrs. Willis argues that the pledge of collateral at her father's request makes her a subsurety who is not liable for contribution.

By its terms, the agreement terminated upon Mr. Firestone's death. Despite the fact that Mrs. Willis's contractual compulsion to furnish collateral was accordingly removed, she continued to furnish collateral for the note. In fact, she also furnished collateral, in the form of Alaska Airlines stock, throughout the life of the note without reference to the agreement with her father. We conclude that, whatever their relationship before the termination of the agreement, after the termination of the agreement with her father Mrs. Willis was a co-surety for her husband's note. We also conclude that the contract between Mr. Firestone and Mrs.

Willis contains so agreement by Mrs. Willis to indemnify her father. In any event, such an agreement would have terminated upon Mrs. Firestone's death. As a result, plaintiff, who paid Mr. Willis's note, is entitled to contribution from the co-surety, Mrs. Willis.

The trial court set the loss at $858,958.13. Each surety is liable for one half of this amount, or $429,479.07. In line with the trial court's findings, we feel that Mrs. Willis is entitled to a credit against her $429,479.07 liability for the $220,500 she has already paid on the note she gave her father pursuant to their agreement, reducing her liability to $208,979.07. Contribution is an equitable remedy based on considerations of justice. From the terms of their agreement it seems clear that Mr. Firestone wished to substitute Mrs. Willis's liability on an

interest bearing note for liability on a non-interest bearing note. The $220,500 note represents the same indebtedness on Mrs. Willis's part and in effect represents her initial liability as a co-surety. Equity will not allow plaintiff to recover twice on the same obligation.

As co-sureties, who must share the loss, plaintiff and Mrs. Willis must also share the proceeds from the sale of Mr. Willis's interest in the collateral. Assuming that all of these proceeds are paid to plaintiff, Mrs. Willis should receive a credit against her $208,979.07 liability for one-half of Mr. Willis's interest in the jointly held Alaska Airlines stock and the jointly held Firestone stock. After Mrs. Willis's liability of $208,979.07 is reduced by the amount of these proceeds, such of her stock held as collateral as is necessary, may be sold to satisfy her remaining

liability. Restatement of the Law, Security (1941) 383, Section 141. Accordingly, we find plaintiff's assignment of error to be without merit and find Mrs. Willis's assignment of error to be well taken to the extent indicated above.

SUMMARY

We affirm the trial court's decision as to Mr. Willis, reverse the trial court's decision as to Mrs. Willis, and remand to the trial court for entry of judgment against Mrs. Willis in accordance with this opinion.

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The Court finds that there were reasonable grounds for these appeals.

We order that a special mandate, directing the County of Summit Common Pleas Court to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute

the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs to be divided equally between Charles Willis and The Cleveland Trust Company.

Exception.

WILLIAM R. BAIRD
Presiding Judge
- for the Court -

MAHONEY, J.
HOFSTETTER, JR.
CONCUR

(Hofstetter, J., retired Judge of the Eleventh District Court of Appeals, sitting by assignment pursuant to Article IV, §6(C), constitution).

APPENDIX C

COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

THE CLEVELAND TRUST COMPANY, EXECUTOR OF THE ESTATE OF HARVEY S. FIRESTONE, JR., DECEASED Plaintiff	)	CASE NO. CV 79 3 793 JUDGE MURPHY
-vs- CHARLES F. WILLIS, JR., et al Defendants	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT ENTRY

- - -

This cause came on for trial before this Court on the Amended Complaint of the Plaintiff and the pleadings of the parties for a declaration of the right to the parties as to certain collateral held by this Court. All parties being present, this Court proceeded to hear the evidence adduced by the parties on their respective claims, and upon that evidence and the admission of

the parties, makes the following findings:

FINDINGS OF FACT

1. The Defendants, Charles F. Willis, Jr., and Elizabeth Firestone Willis, executed a series of notes during the term of their marriage for various purposes and generally to further the business plans of the said Charles F. Willis, Jr.

2. On or about September 30, 1969, a new note was prepared in the principal sum of Four Hundred Forty-one Thousand Three Hundred Ninety-nine Dollars ($441,399.00) which was signed by the Defendant, Charles F. Willis, Jr., and forwarded to the attorney for Elizabeth Firestone Willis, he having expected her to sign said note as she had in the past as an accommodation party.

3. During this period of time the parties were separated and in the process of

obtaining a divorce, and due to her financial situation, her father, Harvey S. Firestone, Jr., the Plaintiff's decedent, signed said note in her stead which apparently was not known to the Defendant, Charles F. Willis, Jr. but was in furtherance of his business plans, and as admitted, was an accommodation maker to him.

4. During the course of the transactions in the notes and up to the note dated September 30, 1969, the parties, as collateral security, delivered the following shares of common stock and held by this Court as follows:

STOCK	TYPE OF OWNERSHIP	NO. OF SHARES
a. Alaska Airlines, all common stock.	Jointly held by Charles F. Willis, Jr. and Elizabeth Firestone Willis	37,400
b. Firestone Tire & Rubber Co., all common stock.	Jointly held by Charles F. Willis, Jr. and Elizabeth Firestone Willis	3,992

c. Firestone Tire & Rubber Co., all common stock.	Solely owned by Elizabeth Firestone Willis	20,500

The above stock having been delivered to the Clerk of this Court awaiting the resolution of this suit by the Defendant, Firestone Bank.

5. Harvey S. Firestone, Jr., being deceased, and the Plaintiff as his personal representative, was ordered by the Probate Court of Summit County, Ohio to pay the aforesaid note to the Plaintiff upon its demand, which amount was paid on or about March 26, 1979, in the sum of Five Hundred Twenty Thousand Eight Hundred Eighty-eight Dollars and Seventy-four Cents ($520,888.74), along with certain other interest having become due (See that Court's order of payment). This Court having recomputed the amount due from the date of that order, along with certain interest payments made by the Plaintiff with the rate

of interest at 8% rather than the 9% in that Court's order and the 10% computed by the Plaintiff (See Plaintiff's Request for Admission, No. 50), is determined to be in the sum of Eight Hundred Fifty-eight Thousand Nine Hundred Fifty-eight Dollars and Thirteen Cents ($858,958.13) as of the date of trial.

6. At the time that the Plaintiff's decedent signed the note to the Firestone Bank, the Defendant, Elizabeth Firestone Willis, executed a note in the amount of Two Hundred Twenty Thousand Five Hundred Dollars ($220,500.00) to Harvey S. Firestone, Jr. without interest and agreed with Plaintiff's decedent that her stock should remain as collateral security for the payment of the principal note.

On September 10, 1982, Plaintiff was awarded judgment against Defendant, Elizabeth Firestone Willis, by this Court in

the amount of Two Hundred Twenty Thousand Five Hundred Dollars ($220,500.00) with interest at the rate of 10% per annum from the date of judgment and the costs of that suit (See record, Summit County Common Pleas, CV 82 9 2731).

CONCLUSION OF LAW

1. Elizabeth Firestone Willis, by virtue of her pledging her stock as collateral security for the payment of the within debt, when she was released and the signature of Plaintiff's decedent substituted on the note, allows that her stock be held as collateral security for the payment of the debt and which is assigned by law to the Plaintiff to satisfy that debt.

2. There is one total debt due to Plaintiff in the sum of Eight Hundred Fifty-eight Thousand Nine Hundred Fifty-eight Dollars and Thirteen Cents ($858,958.13) as at June 27, 1983, which

debt includes the judgment awarded the Plaintiff against Elizabeth Firestone Willis in the sum of Two Hundred Twenty Thousand Five Hundred Dollars ($220,500.00) referred to in paragraph six (6) above.

3. The Defendant, Charles F. Willis, Jr., was not released by the substitution of the signature of Plaintiff's decedent for that of Elizabeth Firestone Willis, there being no fraud being demonstrated and there being no material alteration to change his contract nor impair the security for its payment at the time the note was signed. See R.C. 1303.43, Official Comment 1.

Accordingly, the security for the debt, that is, Willis' stock pledged as collateral security for the debt, is subject to the claim of Plaintiff, in satisfaction of the debt evidenced thereby. See R.C. 1303.51 (E).

4. As to Mr. Charles F. Willis, Jr.'s claim, lack of jurisdiction, in personam, for this Court, this Court finds sufficient business contacts in the State of Ohio not only evidenced by the dealings of the parties at the Firestone Bank of Ohio, but certainly this Court has "in rem" jurisdiction by virtue of holding the collateral security above mentioned.

It is therefore ORDERED, ADJUDGED and DECREED that the following stock held by the Court be transferred to the Plaintiff for sale at market price:

STOCK	TYPE OF OWNERSHIP	NO. OF SHARES
a. Alaska Airlines, all common stock.	Jointly held by Charles F. Willis, Jr. and Elizabeth Firestone Willis	37,400
b. Firestone Tire & Rubber Co., all common stock.	Jointly held by Charles F. Willis, Jr. and Elizabeth Firestone Willis	3,992

c. Firestone Tire & Rubber Co., all common stock.	Solely owned by Elizabeth Firestone Willis	20,500

It is further ORDERED, ADJUDGED and DECREED that Judgment be and is hereby rendered against Charles F. Willis, Jr. in the sum of Eight Hundred Fifty-eight Thousand Nine Hundred Fifty-eight Dollars and Thirteen Cents ($858,958.13), and from the proceeds of sale, the total debt owed to Plaintiff by Charles F. Willis, Jr. and Elizabeth Firestone Willis shall be satisfied. Thereafter, the balance of the proceeds from the sale of said stock shall be shared by Charles F. Willis, Jr. and Elizabeth Firestone Willis in accordance with their relative ownership of the stock at the time it was pledged as security for the note, as applied to the sale price of the stock currently.

JUDGE JAMES E. MURPHY

cc: All counsel of record

APPENDIX D

UNITED STATE COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

CHARLES F. WILLIS, JR., Appellant,	)	
v.	)	Nos. 80-2200, 80-2197
ELIZABETH FIRESTONE WILLIS, et al.	)	
CHARLES F. WILLIS, JR.,	)	
v.	)	
ELIZABETH FIRESTONE WILLIS, et al., CLEVELAND TRUST CO., Appellants.	)	

Before TAMM, ROBB, and EDWARDS, Circuit Judges.

Opinion for the Court filed by Circuit Judge EDWARDS.

HARRY T. EDWARDS, Circuit Judge:

In this case Charles Willis

appeals from the District Court's decision that his former wife, Elizabeth Willis, was entitled to contribution for interest which she paid on a 1969 loan. Defendant Cleveland Trust, executor for Harvey Firestone (Elizabeth's father), appeals from the court's ruling that it has personal jurisdiction over Cleveland Trust. For the reasons set forth below, we reverse the District Court's determination that it could assert jurisdiction over Cleveland Trust. We affirm, although for different reasons than those relied on by the District Court, the court's decision to grant Elizabeth half of the interest paid by her. We also affirm the decisions of the District Court dismissing Charles Willis' claims against the Firestone Bank and against Elizabeth Willis.

I. BACKGROUND

Because the extended series of financial transactions and the lengthy history of this litigation have been carefully documented in the District Court's opinion,[1] we will discuss only briefly those events which form the basis of this appeal. This case began when Charles Willis sued his former wife Elizabeth for a declaration of their rights to property, both real property located in the District of Columbia and personal property consisting mostly of stock owned jointly by Charles and Elizabeth, some of which was being held as collateral on a 1969 note with the Firestone

1/ See Memorandum Opinion, reprinted in Joint Appendix (J.A.) at 210; Finding of Fact and Conclusion of Law, reprinted in J.A. at 118.

Bank.[2] The basis of Charles' claims against Elizabeth initially derived from an antenuptial agreement and an alleged oral settlement at the time of their divorce.

When Charles learned during the course of litigation that Elizabeth's father, Harvey Firestone, had co-signed the 1969 note instead of Elizabeth, Charles amended his complaint by adding the Firestone Bank, which held the note, and Cleveland Trust Company, the executor of Harvey's estate. Charles claimed that he was discharged from the 1969 note by Harvey's substitution and that Harvey,

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2/ The 1969 note was merely the last of a series of notes which Charles and Elizabeth had signed principally to finance Charles' business venture in Alaska Airlines. The District Court found that each note in the series constituted a separate contract.

Elizabeth and the Firestone Bank had converted his property and entered into a conspiracy to defraud him. He continued to assert his claims with respect to the real estate and to seek a declaration of his rights under the oral property settlement and the antenuptial agreement. Elizabeth counterclaimed for interest which she had paid on the 1969 note and on a series of previous notes.

Defendants Firestone Bank and Cleveland Trust moved to be dismissed for lack of personal jurisdiction. In a pretrial ruling, the District Court granted Firestone's motion because it found that Firestone did not do business in the District and that "virtually all communications" in connection with the 1969 note occurred outside the District.

As Harvey's executor, defendant Cleveland Trust was subject to the court's jurisdiction to the same extent that Harvey would have been. See D.C. Code Ann. § 13-421 (1973). The District Court found that because Harvey had an interest in real property within the District of Columbia, which was the basis for one of Charles' claims, Harvey, and consequently Cleveland Trust, was subject to the court's jurisdiction with respect to all of Charles' claims. After the court found that it had jurisdiction over Cleveland Trust, the executor counterclaimed against Charles to recover payments made by or on behalf of Harvey on the 1969 note.

At the trial, the District Court denied Cleveland Trust's counterclaim against Charles. It found that while Harvey

was liable to the Firestone Bank as a co-maker on the 1969 note, Harvey was barred by section 3-407[3] of the Uniform

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3/ Section 3-407 provides in part:

As against any person other than a subsequent holder in due course

(a) alteration by the holder which is both fraudulent and material discharges any party whose contract is thereby changed unless that party assents or is precluded from asserting the defense;

(b) no other alteration discharges any party and the instrument may be enforced according to its original tenor, or as to incomplete instruments according to the authority given. UCC § 3-407(2).

Commercial Code (UCC) from asserting a right of contribution against Charles.[4] Although the court found that Elizabeth was not liable on the 1969 note, it granted her counterclaim for interest paid on the note. The court reasoned that when Charles authorized Elizabeth to sign the note, he became liable in an action for contribution on account of actions taken by her within the scope of his authorization. The court also found that no defendant had attempted to defraud Charles or convert his property.

4/ The court found, and the parties agreed, that Ohio law controlled the merits of the claims arising from the 1969 note. For ease of reference, however, we adopt the convention of the District Court and the parties of referring to the comparable UCC section, which the court found to be substantially identical to Ohio law.

It dismissed his allegations of conspiracy as "fantastic."[5]

Cleveland Trust appeals both from the District Court's determination that it was subject to the court's in personam jurisdiction and from the court's denial of its counterclaim against Charles for contribution. Charles appeals from the court's decision that it did not have in personam jurisdiction over the Firestone Bank, from the court's denial of his claims for fraud and conversion and from the court's decision to grant Elizabeth's counterclaim for contribution for interest

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5/ The court also held against Charles with respect to his claims to the real property and to his rights under the antenuptial agreement and the oral settlement. No party has appealed either the court's jurisdiction to decide these claims or the court's disposition of the claims on the merits.

paid on the 1969 note.

Because we reverse the District Court and dismiss Cleveland Trust as a defendant, we vacate the District Court's disposition on the merits with respect to both the claims against Cleveland Trust and its counterclaims against Charles. Because there is not question as to the court's jurisdiction over Elizabeth, we reach the merits of hers and Charles' claims against each other and affirm the court's decision to grant Elizabeth recovery of half the interest paid on the 1969 note.

II. JURISDICTION OVER CLEVELAND TRUST

The District Court determined that, under the District of Columbia long arm statute,[6] Harvey's interest in the real estate located in the District of

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6/ See D.C. Code Ann. § 13-421 et seq. (1973).

Columbia was sufficient to establish jurisdiction over Cleveland Trust with respect to all of Charles' claims. See Memorandum, reprinted in J.A. at 107, 109. Cleveland Trust does not dispute the District Court's determination that if the court would have had jurisdiction over Harvey it can now exert jurisdiction over Cleveland Trust as his executor. Cleveland Trust contends instead that Harvey's interest in the real estate did not provide a sufficient basis to asset jurisdiction with respect to all of Charles' claims.[7]

7/ Because neither Charles nor Cleveland Trust has appealed the District Court's disposition of the merits of Charles' claim to the real estate, the District Court's determination that it had jurisdiction over Cleveland Trust with respect to that claim is not before us. We assume for the purposes of this analysis that jurisdiction did exist for that claim.

We agree.

[1] Section 13-423(b) of the District of Columbia long arm statute[8] provides that "[w]hen jurisdiction over a person is based solely upon this [long arm] section, only a claim for relief arising from acts enumerated in this section may be asserted against him." The District of Columbia courts have interpreted section 13-423(b) as a bar to claims unrelated to the acts forming the basis for personal jurisdiction. See Berwyn Fuel, Inc. v. Hogan, 399 A.2d 79, 80, (D.C. 1979) (per curiam); Cohane v. Arpeja-California, Inc., 385 A.2d 153,159 (D.C.), cert. denied, 439 U.S. 980, 99 S.Ct. 567, 58 L.Ed.2d 651 (1978). Because Charles' remaining claims against Harvey neither derived from nor are connected with Harvey's interest in the real estate, we find that the District Court erred in

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8/ See D.C. Code Ann. § 13-423(b) (1973).

relying on the real estate as a basis for asserting in personam jurisdiction over Cleveland Trust with respect to the other unrelated claims.

[2] In his brief and at oral argument before this panel, Charles did not rely on the theory advanced by the District Court. Instead, Charles now contends that because, under section 13-423(a)(1),[9] Harvey was transacting business in the District of Columbia, Cleveland Trust is subject to the court's jurisdiction. Because the District of Columbia courts have held that section

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9/ See D.C. Code Ann. 13-423(a)(1) (1973). Charles' counsel expressly rejected at oral argument any reliance on §§ 13-423 (a)(3) and (a)(4), which essentially provided jurisdiction over torts committed in or having an effect in the District of Columbia, as a basis for jurisdiction. See D.C. Code Ann. §§ 13-423(a)(3) and (a)(4) (1973).

(a)(1) was intended to extend the District's jurisdiction to the limits of the due process clause, see Environmental Research International, Inc. v. Lockwood Greene Engineers, Inc. 355 A.2d 808 (D.C. 1976) (en banc), it is necessary to determine whether sufficient minimal contacts existed between Harvey and the District to satisfy due process. An examination of both the evidence presented in response to Cleveland Trust's Motion to Dismiss and the evidence that was adduced at trial reveals that Charles failed to satisfy his burden of proof.

In Charles' response to Cleveland Trust's Motion to Dismiss, it was alleged that Harvey Firestone had an interest in property in the District of Columbia and that he had paid off deeds of trust on that property. Charles also alleged that the other cause of action arose out of the "tortious conduct of the decedent acting

alone or in concert with his daughter and the Firestone Bank to impair plaintiff's rights of action in the District of Columbia ...." See Opposition of Plaintiff to Motion of Defendant The Cleveland Trust Company, reprinted in J.A. at 100. Charles acknowledged that the 1969 note did not show that Harvey signed it in the District; however, he alleged that Harvey's signing had an impact in the District of Columbia. See id. at 101.[10]

As noted above, the allegations that Harvey had an interest in real estate in the District and paid off two deeds of trust not provide a sufficient basis for exerting in personam jurisdiction over Cleveland Trust with respect to the other unrelated claims. Charles' second allegation, that Harvey acting in concert with his

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10/ Neither party submitted affidavits and the motion to dismiss was decided on the pleadings.

daughter impaired Charles' interests in the District, fails to allege that Harvey entered into the District, wrote letters into or placed calls in the District. Because Charles rejected sections (a)(3) and (a)(4) as the bases for jurisdiction, see note 9, supra, it does not matter whether Harvey's acts in Ohio had an effect in the District. Because no fact was alleged in response to the Motion to Dismiss to establish that Harvey was doing business or had any contact in the District, Charles failed to allege any claim--apart from the suit on the real estate--upon which the District Court might properly assert in personam jurisdiction over Cleveland Trust. See Mosley v. Nationwide Purchasing, Inc., 485 F.2d 418, 420 (Temp.Emer.Ct.App.1973) (Tamm, J.)(interpreting D.C. Code § 13-423(a)).

Although the District Court made

no findings after a full trial that there were any contacts between Harvey and the District of Columbia, Charles argues that evidence exists in the trial record that Harvey both placed calls in and sent letters to the District. The evidence noted by Charles establishes that Harvey consulted with his accountants in Ohio and subsequently entered into an agreement with Elizabeth to take her place on the 1969 note. See J.A., Vol. II, Defendant's Exhibits 132, 133 and 136. None of these exhibits establishes, however, that Harvey had any contact with the District of Columbia. Charles also notes that H. W. Harrell, whom the District Court found to be the "financial adviser of the Firestone family," sent two letters to Elizabeth's attorney. See J.A., Vol. II, Defendant's Exhibit 114 and Plaintiff's Exhibit 19. The first letter reported on all outstanding

loans against Elizabeth and listed the total number of Firestone shares held by her. The second letter, written in response to a request from Elizabeth's attorney, noted the interest paid on loans held by Charles and Elizabeth. The evidence noted by Charles also establishes that Harvey placed two calls in the District of Columbia. See J.A., Vol. II, Defendant's Exhibits 128 and 131 and Plaintiff's Exhibits 25 and 60. The issue remaining before us is whether these contacts provided a sufficient basis for exerting jurisdiction over Cleveland Trust as Harvey's executor.

In determining whether the exercise of jurisdiction satisfied due process, the Supreme Court in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980), engaged in a two-pronged analysis. The Court found that the doctrine of "minimum

contacts" performed two related but distinguishable functions. The first function is to protect defendants from the burden of litigating in distant forums. Relevant considerations, which the Court grouped under the rubric of reasonableness and fairness, include an assessment of the burden on the defendant considered in light of the forum state's interest in adjudicating the dispute, the plaintiff's need for some forum in which to litigate and the interstate judicial system's interest in efficient resolution of controversies. See id. at 292. The second prong, which recognizes the territorial limitations on the power of the states, requires that there be sufficient affiliating circumstances connecting the forum state and the nonresident defendant to empower the court to require that defendant to appear. See id. at 293-94, 100 S.Ct. at 565-66.

[3] Under the first prong, we find that the interests of reasonableness and fairness do not favor adjudicating this case in the District of Columbia. The District of Columbia has little interest in providing a forum to a nonresident plaintiff. See McGee v. International Life Insurance Co., 355 U.S. 220, 223, 78 S.Ct. 199, 201, 2 L.Ed.2d 223 (1957). Nor does the District have an interest in the subject matter of the suit; the contract was neither made nor performed in the District and the rights asserted on the contract involve, as the District Court found, unsettled issues of Ohio law. Moreover, the District has enacted no jurisdictional statute which might indicate its manifest interest in the subject matter in dispute. See Shaffer v. Heitner, 433 U.S. 186, 214-15, 97 S.Ct. 2569, 2584-85, 53 L.Ed.2d 683 (1977). While it might be convenient for Charles to bring

this action in the District, there is no indication that this is the only forum available. Indeed, it would seem that a suit by Charles in Ohio, where the majority of parties and witnesses are located, and whose laws the parties agree govern, would advance the interest of the interstate judicial system. We do not mean to suggest that a center of gravity test is necessary to establish jurisdiction; we only find that under the criteria noted in World-Wide there appears to be little interest either on the part of the District of Columbia or on the part of the interstate judicial system which would outweigh the burden placed on the nonresident defendant.

The second prong of World-Wide requires the presence of sufficient affiliating circumstances to empower a state to asset jurisdiction over a nonresident defendant. Although this determination

presents a close question, we find that under Kulko v. California Superior Court, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978),[11] Harvey's limited contacts with the District of Columbia do not provide sufficient affiliating circumstances.

11/ In Kulko, the former wife of the defendant brought suit in California to secure increased child support payments from defendant on behalf of their children. Although defendant was domiciled in New York, the California courts asserted in personam jurisdiction over him because he had "purposely availed himself of the benefits and protections of California" by sending his daughter to live with her mother there. The Supreme Court reversed, holding that the exercise of in personam jurisdiction by the California courts over the father, a New York domiciliary, would violate the due process clause of the Fourteenth Amendment.

[4] The fact that Harvey and Elizabeth entered into an agreement is by itself an insufficient contact. Absent some indication that the agreement was signed or negotiated in the District of Columbia, the fact that one party is a resident of the forum state is an insufficient basis for asserting jurisdiction over the other. See Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). The alleged relevance of the communications between H. W. Harrell and Elizabeth's attorney derives from Charles' assumption that Harrell was acting as Harvey's agent. The District Court, however, did not find that to be the case. The court found that Harrell acted as financial adviser for the whole Firestone family. As such, the fact that Harrell informed Elizabeth of her outstanding loans or supplied her attorney with information at his request does not imply that Harrell was

acting as Harvey's agent. Indeed, Harrell often looked after Charles' own business interests in Akron and acted as an intermediary, for example, between Charles and the Firestone Bank.

The two contacts that are relevant are the two telephone calls made by Harvey. One of these calls was to inform Elizabeth, who was in the process of divorcing Charles, that the bank was not going to demand immediate action on her note with Charles. During the second call, Harvey requested that the 1969 note be sent to him. While it is true these contact concern a financial transaction--i.e., the 1969 note--the District Court found that it was Harvey's concern for his daughter's financial stability that prompted him to devise a plan to reduce her indebtedness. See J.A. at 129. Thus, Harvey appears to have had no commercial purpose in placing calls in the

District. The remaining question thus before us is whether these two non-commercial calls are sufficient affiliating circumstances to subject Harvey's executor to the jurisdiction of the District of Columbia.

Kulko, supra, reaffirmed the principle first stated in International Shoe Co. v. Washington, 326 U.S. 310, 318, 66 S.Ct. 154, 159, 90 L.Ed.2d 95 (1945), that the nature and the quality of the contacts control the propriety of the forum state's assertion of jurisdiction. Thus, Kulko distinguishes acts taken in the context of a family relationship from those designed to solicit business. "[T]he mere act of sending a child to California to live with her mother is not a commercial act and connotes no intent to obtain or expectancy of receiving a corresponding benefit in the State that would make fair the assertion of that State's judicial jurisdiction." Id. at

101, 98 S.Ct. at 1701. Although the contact may be directly related to the transaction at issue, as the father's sending his child to California was in Kulko, the telling question was designed to derive a benefit from the forum state which would justify the assertion of jurisdiction.

Because Harvey's acts were not designed to derive any benefit of the sort contemplated by the Court in Kulko,[12] such as participation in a commercial venture in the District of Columbia, the nature of the contacts argues against a finding that Cleveland Trust should be subjected to the burden of defending its interests here. Our decision that jurisdiction is inappropriate because the contacts proved by Charles do not satisfy the second prong of World-Wide is reinforced by our evaluation of the first

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12/ See Kulko v. California Superior Court, 436 U.S. at 94-97, 101, 98 S.Ct. at 1698-99, 1701.

prong. Although the considerations grouped under the first prong may not be dispositive, see World-Wide, supra, 444 U.S. at 294, 101 S.Ct. at 565, the virtual absence of any interest of the forum state in hearing this matter also argues for dismissal for want of jurisdiction.[13]

III. ELIZABETH'S COUNTERCLAIM FOR CONTRIBUTION

Charles appeals from the District Court's conclusion that Elizabeth was entitled to

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13/ We affirm as well the District Court's decision that it did not have jurisdiction over the Firestone Bank. The court found that virtually all communications with respect to the 1969 note took place outside the District of Columbia. We find that the District Court's factual conclusion was correct and that the Firestone Bank's limited contact was an insufficient basis for personal jurisdiction.

"contribution"[14] from Charles for the

14/ When two persons have assumed a joint obligation such as a contract, a creditor normally may enforce the obligation against either party; however, as between the joint debtors each is only liable for one-half of the debt. "Contribution" is an equitable remedy designed to allow a joint debtor who has been compelled to pay the whole debt to recover half from the other debtor. See Pietro v. Leonetti, 26 Ohio App.2d 221, 270 N.E.2d 660, 662 (1971), aff'd 30 Ohio St.2d 178, 283 N.E.2d (1972). Contribution is distinguished from "subrogation" by the fact that the right to contribution derives from the existence of a joint obligation. Subrogation, however, results from the fact that in some circumstances a party may be allowed to assert the claims of a creditor to prevent unjust enrichment.

interest which she paid on the 1969 note.[15] The court held that because Charles had authorized Elizabeth to sign as a co-maker, he became liable under the Ohio analogue of UCC section 3-407[16] for all obligation arising

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15/ The court held that Elizabeth was entitled to contribution for the interest paid on the whole series of notes which she co-signed with Charles. However, the court also found that each of the notes was a separate contract and that the statute of limitations barred recovery on the notes prior to the 1969 note. Because neither party appeals the court's determination that the statute of limitation bars recovery on prior notes, this appeal focuses solely on Elizabeth's rights in relation to the 1969 note.

16/ See note 3, supra.

out of Elizabeth's actions as a co-maker. Charles contends that the court's result is not supported by Ohio law. Furthermore, he argues that the validity of the judgment in favor of Elizabeth is cast in doubt by other findings of the court. Because the court found that Elizabeth was neither a party to nor liable on the 1969 note, see J.A. at 215, Charles contends that the court's decision produces the anomalous result of preventing Charles from enforcing the note against Elizabeth but allowing her to sue him on the note.

[5] We affirm the result reached by the District Court but for different reasons than those advanced below. Although the court found Elizabeth was not liable on the 1969 note and that the collateral which she had pledged for the 1968 note had been released, the court also found that Elizabeth's separate agreement with her

father resulted in her Firestone stock being used as collateral for the 1969 note. Thus, although Elizabeth was not personally bound by the 1969 note, her property was subject to foreclosure if either of the co-makers defaulted. We hold that, given these facts, Ohio law allows Elizabeth to recover as a subrogee.

Although Ohio doe not allow a mere volunteer to create a claim by bestowing a gratuitous benefit, the Ohio courts have stated that a person who pays another's debts to protect his own property is not a volunteer. See In re Outhwaite's Estate, 94 N.E.2d 122 (Ohio Misc. 1949), aff'd, 94 N.E.2d 59 (Ohio App. 1950); Reed v. Ramey, 82 Ohio App. 171, 80 N.E.2d 250 (Ohio App. 1947). The court in Reed stated:

> [I]f the facts untraversed had shown that the [company] had a lien on plaintiffs' property which could be

> foreclosed, then the plaintiffs were fully warranted in protecting their title and ownership of the property from possible sale under foreclosure by paying the creditor, and would have a right to collect the amount of such payment from the defendants. Under such circumstances, they could not be considered mere volunteers.

80 N.E.2d at 256. Here the Firestone Bank had a lien on Elizabeth's Firestone stock which she protected from foreclosure by maintaining the interest payments. Thus she had a protectible interest sufficient to entitle her to subrogation.

The District Court considered Elizabeth's claim that she be treated as a subrogee but rejected it because it would entitle her to collect the entire interest payment from Charles. The court felt that it would violate equitable principles to

give Elizabeth a better position than she would have had it she had signed the 1969 note. We believe that the District Court was not compelled to reach that conclusion.

The District Court found that both Charles and Harvey were liable on the 1969 note. The court held, however, that since Harvey had signed the 1969 note without Charles' knowledge or approval, Harvey could not seek contribution from Charles for payments made on the note. The Court found that under section 3-407 of the UCC, Charles was discharged from liability on the note as against claims made by Harvey.

The District Court also found that, despite the fact that Elizabeth was not a party to or liable on the 1969 note, Charles was liable to Elizabeth for contribution. On this point the trial court found that Elizabeth could recover a portion of the interest that she had paid because

the actions that she had taken were within the scope of Charles' authorization.

Although we are not required to decide any claims of Charles against Harvey, or vice versa, for purposes of our analysis here we find that Charles and Harvey were co-makers on the 1969 note. As such, each was entitled to contribution from the other. Furthermore, even assuming arguendo that the 1969 note was "altered," we believe that neither the literal language of section 3-407 of the UCC, referring only to alteration by the holder, nor the purpose of the section bars contribution in favor of Harvey. We reject any contrary holdings of the District Court.

Since we find that Charles and Harvey alone were the "co-makers" of the 1969 note, we disagree with the District Court's conclusion that Elizabeth could recover as a co-maker. Nevertheless, we do

hold that Elizabeth could assert rights against Charles on a claim of subrogation. As a subrogee, it is true that Elizabeth could normally seek full recovery against either co-maker (i.e., Charles or Harvey) for the interest that she paid on the 1969 note. Either co-maker could in turn seek contribution from the other. However, in considering the extent to which Elizabeth should be entitled to recover as a subrogee, the District Court could have apportioned the liability between the two co-makers. A remedy which would have allowed Elizabeth to have recovered only half of the interest payments from Charles was surely within the equitable powers of the District Court. We thus find that the result reached by the court was correct, although its limited conception of its powers prevented it from adopting what we consider to be the course most consistent with Ohio law.

IV. CONCLUSION

Consistent with our opinion in this case, our judgments are as follows:

(1) We affirm the decision of the District Court dismissing Charles Willis' suit against the Firestone Bank.

(2) We reverse the decision of the District Court asserting personal jurisdiction over Cleveland Trust and remand the case with instructions to the District Court to dismiss Charles Willis' actions against Cleveland Trust and Cleveland Trust's counterclaims against Charles Willis.

(3) We affirm the District Court's judgment of $38,131.98 in favor of Elizabeth Willis against Charles Willis, albeit for reasons different than those advanced by the District Court.

(4) We affirm the additional judgments of the District Court in favor of Elizabeth Willis with respect to claims asserted by Charles Willis against her.

BEST

APPENDIX E

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

CHARLES F. WILLIS, JR.,	:	
Plaintiff,	:	
v.	:	C. A. No. 76-1225
ELIZABETH FIRESTONE	:	
WILLIS, et al.,	:	
Defendants.	:	

FINDING OF FACT AND CONCLUSIONS
OF LAW OF UNITED STATES DISTRICT
JUDGE CHARLES R. RICHEY

This case was tried to the Court without a jury on April 14 & 15, 1979. Plaintiff, Charles F. Willis, Jr., ("Charles") brings this action seeking monetary damages, a declaratory judgment,

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and equitable relief. The two defendants are Elizabeth Firestone Willis ("Elizabeth") and The Cleveland Trust Company, as Executor for the Estate of Harvey Firestone, Jr. Elizabeth and Charles were divorced in 1970; Mr. Firestone, who died in 1973, was Elizabeth's father. Charles' claims for monetary and injunctive relief are based on assertions of breach of contract, inequitable conduct, fraud, conversion and a conspiracy to commit fraud. His claim for a declaratory judgment rests on the theory that he has been discharged from liability on a promissory note which he signed in 1969. The Court finds that none of Charles claims have any merit. The Cleveland Trust Company has filed a counterclaim seeking indemnification, or, alternatively, contribution for payments made by Harvey Firestone, Jr. and his Estate on the 1969

interest in the parties' commercial dealings. First, he claims that under § 3-407(2)(a) the "fraudulent alteration" by the holder of the note, The Firestone Bank, has discharged him from all liability. As an additional ground, he claims that the holder's "release" of Elizabeth and its "unjustifiable impairment" of his right to the collateral are both grounds for a discharge pursuant to § 3-606(1) of the UCC. The executor's counterclaim rests on the premise that Harvey Firestone was merely an accommodation party to the note, pursuant to § 3-415(1). Accordingly, the Executor seeks complete indemnification for all expenses borne by Mr. Firestone and his Estate. Alternatively, the Executor submits that even if Mr. Firestone were a co-maker of the note, he has a right to contribution. Elizabeth Willis' claim parallels that of

the Executor. She seeks indemnification, as an accommodation maker, for her interest payments on the earlier notes or alternatively, contribution for amount paid in excess of one-half of the interest paid by her and Charles.

The Court must now resolve the following legal issues:

1) Were Harvey Firestone and Elizabeth Willis accommodation makers on the note or notes they signed with Charles Willis?

2) Did the addition of Harvey Firestone's name to the note of September 30, 1969 discharge Charles Willis under either § 3-407(2)(a) or § 3-606(I) of the UCC?

3) Is Harvey Firestone barred from indemnification or contribution by § 3-407(2)(b) of the UCC?

4) Does the statute of limitations bar any valid claim?

5) Does the defendants' alleged failure to turn over the withheld collateral constitute conversion?

* * *

The Court shall now turn to the main issues presented by the parties' claims and counterclaims.

C. Elizabeth Willis and Harvey Firestone Were Not Accommodation Makers on the Notes They Signed with Charles Willis.

Section 415(1) of UCC article 3, Ohio Rev. Code Ann. § 1303.51(A), states, "An accommodation party is one who signs the instrument in any capacity for the purpose of lending his name to another party to it." Official comment 1 to this section explains that "an accommodation party is always a surety . . . and it is his only distin-

guishing feature." Elizabeth Willis assets that she was merely an accommodation maker when she signed the notes with her husband; Harvey Firestone contends that his status as an accommodation maker is derived from his daughter, whom he allegedly replaced as surety on the 1969 note. The Court is unpersuaded by the contentions of Elizabeth and Mr. Firestone and it finds that she was a co-maker of the notes signed with her husband. Because Mr. Firestone can acquire no greater rights than the party to the note whom he replaced, he too was a co-maker.

* * *

In the light of the foregoing, the Court concludes that Elizabeth Willis received a direct benefit from the proceeds of the notes which she signed with her husband and thus, it was not the intent of the parties to those notes that Elizabeth

sign in an accommodation status. Accordingly, the Court concludes that Elizabeth was not an accommodation party within the meaning of § 3-415(1) of the UCC.

Having found that Elizabeth Willis was not an accommodation maker, the Court must reach a similar conclusion with respect to her father. Although Mr. Firestone played no direct role in the borrowing activities of his daughter between 1958 and 1968, it is undisputed that he may stand in no better position than the party to the note whom he replaces. Accordingly, the Court finds that Harvey Firestone was not an accommodation maker on the notes dated September 30, 1969.

* * *

Nor does section 3-606(1)(a) aid Charles. First the Firestone Bank never "released" Elizabeth Willis from the note of

September 30, 1969. Elizabeth was not a party to that note because her signature was never placed on the operative instrument. Although Charles intended Elizabeth to sign as his co-maker, this intent, by itself, is not sufficient to transform her into an actual maker. Elizabeth's signature is needed for her to become a party to the note. See UCC § 3-401(1) (Ohio Rev. Code Ann. § 1303.37). Because Elizabeth was never a party to the 1969 note, the Bank could not have released her from liability under that instrument. Thus, the Bank did not release any party to the 1969 note or impair Charles' right of recourse against any party to that note.

The Bank, however, did release Elizabeth from liability on the 1968 note when it cancelled that instrument after acceptance of the 1969 note. See UCC §

3-605 (Ohio Rev. Code Ann. § 1303.71). Charles was also released from liability on the 1968 note at the same time.

* * *

Section 3-407(2)(b), by its plain language, must bar any claim by Harvey Firestone's Executor against Charles Willis. When Mr. Firestone signed the note, he completed the instrument in a manner which was contrary to the authority given; this variance -- the presence of Harvey Firestone as a co-maker -- may not be enforced by one other than a holder in due course. When the Executor attempts to recover contribution from Charles, it is seeking to accomplish this proscribed result. Because Charles did not authorize the signature of Harvey Firestone, Jr. on the note, Mr. Firestone is a mere interloper and he may acquire no rights <u>against Charles</u> after the Bank has

called upon him to honor the obligation for which he volunteered.

* * *

In the instant case, Charles Willis' authorization was limited to one co-maker, his wife. Any other co-maker would exceed that authorization and, therefore, could acquire no rights against Charles. Thus, when Mr. Firestone signed the note of September 30, 1969, he was a mere interloper or volunteer, and not a co-maker within the terms of Charles' contract with the Bank. Accordingly, the Court finds that § 3-407(2)(b), Ohio Rev. Code Ann. § 1303.43(b)(2), bars any claim by defendant The Cleveland Trust Company, as Executor for the Estate of Harvey Firestone, Jr., against Charles Willis for payments made on either the principal or interest of the note of September 30, 1969.

* * *

Elizabeth also possesses a clear right to recover any payments which she made on earlier notes which exceed her proportionate share of the obligation. She signed these notes as a co-maker and is therefore entitled to contribution.

* * *

VI. CONCLUSION.

Based on its findings of fact, the Court makes the following conclusions of law:

1. Under the antenuptial agreement, Charles Willis is not entitled to sole possession of the 3,992 shares of Firestone Co. stock registered in the joint names of Charles and Elizabeth Willis.

2. The Georgetown property formerly owned by Charles and Elizabeth Willis should not be placed in a constructive trust for the benefit of Charles Willis.

3. Charles Willis did not enter into a contract with Elizabeth Willis concerning the property settlement to accompany their divorce.

4. Charles Willis is not entitled to a declaratory judgment of discharge with regard to the note he signed dated September 30, 1969.

5. The Cleveland Trust Company, as Executor for the Estate of Harvey Firestone, Jr., is barred from recovery on its counterclaim by virtue of UCC § 3-407(2)(b), Ohio Rev. Code Ann. § 1303.43(b)(2).

6. Pursuant to UCC §§ 3-115, -407(2)(b), and -413(1), Ohio Rev. Code Ann. §§ 1303.13, .43 & .49, Elizabeth Willis is entitled to a judgment of $38,131.98, representing contribution for payments which she made in excess of one-half the costs paid by her and Charles Willis on the September 30, 1969 note.

7. Elizabeth Willis' claim for contribution with respect to prior notes is barred by the District of Columbia statute of limitation. D.C. Code § 12-301.

8. Elizabeth Willis and Harvey Firestone, Jr. did not conspire to commit fraud upon Charles Willis.

9. Except to the extend that the collateral for the 1969 note is necessary to satisfy obligations arising out of the judgment which the Court shall enter in this action, the stock must be returned to the individuals in whose names it is registered.

An order in accordance with the foregoing shall be issued of even date herewith.

Dated: July 23, 1980 Charles R. Richey

United States District Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

CHARLES F. WILLIS, JR.,	:	
Plaintiff,	:	
v.	:	C. A. No. 76-1225
ELIZABETH FIRESTONE	:	
WILLIS, et al.	:	
Defendants.	:	

O R D E R

In accordance with the findings of fact and conclusions of law of even date herewith, it is, by the Court this 23rd day of July, 1980

ORDERED that, with respect to plaintiff's entire complaint, judgment shall be, and the same hereby is, entered for defendants, and it is

FURTHER ORDERED that, with respect to plaintiff's demand for a declaratory judgment of discharge on the promissory note

of September 30, 1969, declaratory judgment shall be, and the same hereby is, denied, and it is

FURTHER ORDERED that, with respect to the counterclaim of defendant The Cleveland Trust Company, as Executor for the Estate of Harvey Firestone, Jr., said counterclaim shall be, and the same hereby is, denied and dismissed, and it is

FURTHER ORDERED with respect to defendant Elizabeth Firestone Willis' counter-claim, judgment shall be, and the same hereby is entered in defendant's favor against Charles F. Willis in the amount of thirty-eight thousand one hundred ninety-one dollars and ninety-eight cents ($38,191.98), and it is

FURTHER ORDERED that each party shall bear its own costs.

Charles R. Richey

United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

CHARLES F. WILLIS, JR.,	:	
Plaintiff,	:	
v.	:	C. A. No. 76-1225
ELIZABETH FIRESTONE	:	
WILLIS, et al.,	:	
Defendants.	:	

MEMORANDUM OPINION OF UNITED STATES DISTRICT JUDGE CHARLES R. RICHEY

This case is before the Court on cross-motions to amend the findings of fact and conclusions of law entered by the Court on July 23, 1980. Plaintiff Charles Willis ("Charles") and defendant The Cleveland

Trust Company as Executor for the Estate of Harvey Firestone, Jr. have each filed such a motion. For the reasons set forth below, the Court has decided to grant these motions in part and to deny them in part. The Court, however, has decided not to change its conclusions of law. Because the Court's prior opinion sets forth the background of this case in full, no summary shall be provided here.

I.

Defendant raises four issues which merit discussion by the Court. First, defendant objects to part IV(E) of the Court's opinion, concerning its right to recover against the plaintiff. The Executor claims that it was not a "volunteer" when it honored the note which Mr. Firestone had signed and further, that it would be inequitable to bar contribution under such circumstances.

Although defendant paid the note pursuant to a valid court order, Mr. Firestone was nonetheless a "volunteer" when he signed the instrument. The Court's prior opinion does not suggest that the note was paid voluntarily, but rather that the obligation to pay the note - Mr. Firestone's decision to sign the instrument - was the act of a volunteer. Neither The Firestone Bank nor Charles Willis, the two parties to the instrument, requested Mr. Firestone's participation; indeed, the facts show that Mr. Firestone acted outside the scope of Mr. Willis's authorization. Under such circumstances, it is not inequitable to bar defendant's claim for contribution. This result is not only mandated by the plain language of UCC § 3-407(2)(b), but also in accord with the pre-UCC business law. Section 3-407(2) actually liberalized the old Uniform Negotiable Instruments Law and

precedent prior that law. Before the adoption of the UCC, the addition of new maker without the consent of the original maker released the original maker from all liability on the note. Stacey v. Fritzler, 160 Ore. 231, 84 P.2d 97, 104 (1938); see Annot., 119 A.L.R. 898 (1939). It is clear that Charles, as a maker of the instrument, is entitled to some deference in selecting his co-makers and the Court's decision reflects this deference. Defendant seeks to recover plaintiff's money or, in the alternative, his stock, even though plaintiff never consented to such an agreement with him. Although the Executor claims that Charles Willis has been unjustly enriched, it has failed to cite a single case in which one party has volunteered to honor the debt of another, without the consent or or knowledge of the original debtor, and thereby acquired a right of

contribution or indemnification against the debtor. The Court rejects defendant's contention and declines to amend its prior conclusions of law concerning the Cleveland Trust Company's claim for contribution.

Defendant has also renewed its contention that Elizabeth Willis was an accommodation maker within the meaning of UCC § 3-415. Defendant again claims that Charles Willis was the party responsible for the joint holding of the Alaska Airlines, Inc. stock and, therefore, his former wife Elizabeth should not be treated as a co-maker. Yet, Elizabeth was certainly aware of her husband's activities and she apparently did not object to the joint holding. Indeed Elizabeth regularly signed renewal notes with the jointly held stock as collateral. Under these circumstances, Elizabeth's consent to the joint titling must be inferred. In effect, Elizabeth is

requesting the Court to make her husband an insurer of her investment activities. Under her theory, if the stock had depreciated, so that the investment was not profitable, she would be able to seek indemnification; yet, if the stock purchased with the loan proceeds had appreciated, she would have been able to enjoy the increased value. The Court rejects this proposition. Elizabeth benefited from the proceeds of the loans which she co-signed with her husband, and, as a result, she must be deemed a co-maker.

Defendant also argues that Charles' borrowing activity with the Industrial Bank of Commerce reflects a "pattern" of conduct indicative of Elizabeth's status as an accommodation maker on the loans with The Firestone Bank. Of course, no claim is before the Court regarding Charles and Elizabeth's loans with the Industrial Bank of Commerce. In its

prior opinion, the Court failed to make findings regarding Charles and Elizabeth's dealings with this bank because the Court did not find these activities relevant to its determination of Elizabeth's status with respect to The Firestone Bank loans. Even assuming that defendant is correct that Elizabeth was an accommodation maker on the Industrial Bank loans, this fact would not create enough of a "pattern" to overcome the clear proof of a benefit to Elizabeth derived from The Firestone Bank loans. Thus, the Court declines to amend its findings in the manner which defendant has requested.

Third, defendant has asserted, for the first time, the theory that Elizabeth Willis must be considered a subrogee for the money which she paid The Firestone Bank between April, 1974 and December, 1975. In Part IV(F) of the Court's opinion, it held

that Elizabeth was entitled to contribution for these payments and it did not address the issue subrogation. The doctrine of subrogation is equitable in nature. See 73 Am Jr. 2d Subrogation § 12 (1974). It rests on the implication of a promise by one party to compensate another who has incurred expenses for his benefit. Here, Elizabeth made interest payments on a note which Charles had signed; she was not a volunteer because the Bank still retained her collateral and she acted, in part, to protect this interest. Id. § 11. as a subrogee, Elizabeth seeks to acquire the rights of Charles's creditor, the Bank, thereby permitting her to recover all of her payments which benefited Charles. Yet, this result would place Elizabeth in the same position as an accommodation maker and the Court has already ruled that Elizabeth is not entitled to this status. See Opinion of

July 23, 1980, part IV(C). Charles only authorized Elizabeth to stand as his co-maker; by acting to protect her collateral, she is not entitled to acquire any greater rights against him. Indeed, it would be anomalous if Elizabeth were permitted to gain a stronger position against her co-investor when she did not sign the loan when she did. Thus, the equities do not favor a conclusion of law which states that Elizabeth was a subrogee. As a result, this aspect of defendant's motion to amend must be denied.

Finally, defendant has moved the Court to amend its finding that Charles Willis typed Elizabeth's name on the note which Harvey Firestone, Jr. later signed. Defendant claims that the Bank performed this act and plaintiff agrees. Accordingly, the Court shall amend pages 12 and 25 of its opinion of July 23, 1980. On page 12, the

Court shall substitute the following in place of the fourth line on the page: "for a second signature and above this space The Firestone Bank had typed". On page 25, the Court substitute the following for the last two lines on the page: "co-maker was re-stated by Mr. Willis' express adoption of the Bank's act of typing Elizabeth's name next to the only available signature space. Id. In light of".

Defendant's motion shall be denied in all other respects.

II.

Plaintiff Charles Willis has also presented few new issues in his motion to amend. For example, Mr. Willis offers a proposed chronology for the signing the the 1969 note; the Court rejects his contention and will stand by its finding that the stock option agreement and note were both signed on April 1, 1970, as reflected by the dates

contained therein. The Court also declines to accept Mr. Willis' theory regarding the application of the statute of limitations to Elizabeth's claims for contribution. The statute of limitations could not begin to run until Elizabeth possessed a cause of action. Her claim could not accrue until the entire debt had been paid, because before then, it would be impossible to determine whether she had paid more than Charles. Accordingly, the Court rejects Charles' claim that the statute of limitations began to run at the time Elizabeth paid The Firestone Bank. Finally, the Court must also decline to accept Charles' argument that Elizabeth could not recover unless she paid more than half of the entire debt. Although generally a party is not entitled to contribution for more than his or her proportionate share, this rule is not inflexible. See 18 Am. Jr. 2d

Contribution § 15 (1965). It is well established that if one party negotiates a compromise extinguishing a joint debts, that party is entitled to contribution for the amount actually paid, even though that amount may be less than his or her proportionate share of the original debt. Id. Here, Harvey Firestone, Jr. and his Executor both paid the largest share of this debt, leaving only $76,263.96 to be paid by Elizabeth. There is no reason why the actions of this third party should accrue solely to the benefit of Charles Willis. Mr. Firestone's activity, like the compromise of a debt, has conferred a benefit on others and the remaining expenses should be shared equally. Thus, when Elizabeth acted as debtor by making the interest payments on the 1969 note, she became entitled to contribution for her expenses in excess of one-half of the sum

paid by her and Charles. The Court has entered judgment in her favor for this amount and it declines to alter that judgment.

The Court, however, shall make several additional findings which plaintiff has requested. First, the Court shall add a finding that the substitution of Harvey Firestone, Jr.'s name for Elizabeth Willis's on the 1969 note was recognized by Mr. Ross, the Vice-President of The Firestone Bank and he brought it to the personal attention of the Bank president. Thus, the Bank was aware of the change in parties. This additional finding does not alter the Court's conclusions of law in any respect; indeed, the Bank's awareness of the change in parties was already implicit in the 3x5 card attached to the 1969 note in the Bank's file. See Opinion of July 23, 1980, at 13.

Second, the Court shall add the

finding that the Bank's cancellation of the 1968 note also cancelled the collateral agreement which Elizabeth had signed in that note. Thus, Elizabeth's interest in the Alaska Airlines, Inc. stock was not subject to an enforceable collateral agreement with the Bank. The Court, however, rejects Charles renewed contention that this release impaired his right of recourse against Elizabeth. First, Elizabeth's Firestone stock remained as collateral through her agreement with her father and this stock could have readily satisfied any right of contribution which Charles might come to possess. Second, and more importantly, plaintiff's contention regarding his right of recourse against Elizabeth reflects a fundamental misconception concerning the specific instrument on which such right might have existed. Even though Elizabeth was released from the 1968 note, so was

Charles; in fact, this entire note was cancelled. As a result, Charles could have no right of recourse on this instrument. With regard to the 1969 note, Elizabeth was never a party to that note and the Bank, therefore, never released her from any obligation on that instrument. Thus, Charles' right of recourse could not possibly have been impaired by the Bank's "release" of Elizabeth from liability. Accordingly, Charles has no claim under UCC § 3-606(1) and the Court declines to amend its judgment in that regard.

Plaintiff's motion shall be denied in all other respects.

III.

Finally, the Court shall amend its judgment to reflect the conclusions concerning the ownership of the parties' stock stated in the opinion of July 23,

1980. Plaintiff and defendant Elizabeth Willis have both sought a declaratory judgment on this issue and it is appropriate that such a judgment be entered.

An order in accordance with the foregoing shall be issued of even date herewith.

Dated: August 29, 1980 Charles R. Richey
United States District Judge

APPENDIX G

THE SUPREME COURT OF OHIO

COLUMBUS

	1985 TERM To wit: November 27, 1985
Cleveland Trust Co., n.k.a. Ameritrust Co., Exr. of the Estate of Harvey S. Firestone, Jr., Deceased Appellee,	Case No. 84-1766 JUDGMENT ENTRY APPEAL FROM THE COURT OF APPEALS
v.	
Charles F. Willis, Jr., Appellants.	

This cause, here on appeal from the Court of Appeals for Summit County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed for the reasons set forth in the opinion rendered herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; and that a mandate be

sent to the Court of Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Court of Appeals for Summit County for entry.

Frank D. Celebreeze
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date November 27, 1985.

JAMES WM. KELLY,
Clerk

SAM F. ADKINS,
Deputy

APPENDIX H

THE SUPREME COURT OF OHIO
COLUMBUS

1986 TERM
To wit: January 15, 1986

Cleveland Trust Co., Appellee,	:	Case No. 84-1766
v.	:	REHEARING ENTRY
Firestone Bank et al., Appellants.	:	(Summit County)

It is ordered by the Court that rehearing in this case is denied.

FRANK D. CELEBREZZE
Chief Justice

I, James. Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 15th day of January, 1986.

JAMES WM. KELLY, CLERK

SAM. F. ADKINS, DEPUTY

APPENDIX I

EXTRACT FROM TRANSCRIPT OF PROCEEDING IN COURT OF COMMON PLEAS SUMMIT COUNTY, OHIO, ON JUNE 27, 1983

"MR. KANE: (Counsel for Petitioner): No, Your Honor, I don't intend to tax the patience of the Court.

But as to Admissions Number 1 through 23, these involve transactions which took place with New York banks as to who got the proceeds, which loans, what purpose they were used for, and all that. The only relevance of that type of testimony to this case would be if it were still in issue in this case as to whether Elizabeth is an accommodation maker on that note, whether she received value for the signature that she put on that note.

That is already res judicata. The United States District Court for the District of Columbia which had jurisdiction over Elizabeth and Charlie found--Judge Richey found by statements of fact that she was not an accommodation maker, that she received one-half of the stock that was purchased with these funds, that she received some of her living expenses and so forth like that; and she is not an accommodation maker, that she was a maker for value.

That issue is no longer before the Court, and so all of these admissions which deal with the background and which would be the factual support for that issue are irrelevant. As I understand--

THE COURT: Those issues have only been determined between Elizabeth and Charles, right? I must make a determination here. Isn't that correct?

MR. KANE: I think the legal status as between those two people has been determined, yes, sir.

Now, as to The Cleveland-- status of Cleveland Trust, that's what you have to determine, as to whether they were co-maker, interloper, or accommodation party. But the status of--

THE COURT: But the admissions of Charles are not requested by Elizabeth nor are they against her interest at this point. Isn't that right?

MR. KANE: I'm saying they're not relevant to any issue which still is in the case between Charles and The Cleveland Trust.

THE COURT: All right.

MR. KANE: Because they-- Elizabeth's status has been determined.

Now, if The Cleveland Trust is going to try to piggyback her and say that because--and try to reopen this question of accommodation party and say she was an accommodation party and therefore when we signed the stock option agreement we accommodated her and we're a piggyback, they're too late. That's already been decided in the District of Columbia. That's not an accommodation party.

That's the reason that--one of the reasons we object, also, to Number 28, because what they're doing is asking us to admit something which is contrary to an already-decided judgment to a Court of competent jurisdiction.

THE COURT: You assume that judgment is correct. You're a good man.

MR. KANE: Well, we've exhausted our appeals, so he is correct. There's nothing I can do about it.

THE COURT: Is that as high as you can go? The Appellate Court in the District?

MR. KANE: That's--the United States Court of Appeals for the District of Columbia.

THE COURT: I thought there was a higher Court.

MR. KANE: There is a Supreme Court, but they don't usually take local cases like this.

THE COURT: All right. I understand your objection."

Later on that same day, the issue was raised by counsel for Elizabeth in connection with identical admission which had been requested from her:

"Mr. Kerper (Counsel for The Cleveland Trust Co.):

Number 28, Your Honor:

'Elizabeth Firestone Willis was an accommodation party on the series of notes to The Firestone Bank executed by her and Charles F. Willis, Jr. between November, 1964 and September 30th, 1968.'

I'm going to request that the Court rule that--that for purposes of this case as to this party, that is, the Plaintiff, Cleveland Trust, has admitted and that under the rule the answer which was given by Elizabeth Firestone Willis is improper; and, secondly, that The Cleveland Trust is not bound by any judgment which was reach in the D. C. Court.

THE COURT: You want to argue that point, Counselor?

MR. WEINER: We would, Your Honor, if I may be heard.

You have the answer before you, Your Honor?

THE COURT: Yes, sir. Yes, sir.

MR. WEINER: Okay. I do believe the answer is certainly appropriate under Rule 36, and I'm not quite sure why Counsel says it's not appropriate; and I'd like to hear from Counsel as to why it's not appropriate. That issue as to whether or not Elizabeth Firestone Willis was an accommodation party in a series of notes was resolved as between Elizabeth Firestone Willis and Charles Willis in the District Court and Court of Appeals in Washington, It's a legal matter.

MR. KERPER: My response to that, Your Honor, is, we're not asking to be used against Charles Willis. We're asking on behalf of Cleveland Trust, and Cleveland Trust was not a party to that lawsuit.

THE COURT: And so ruled by dismissing these summary judgments--

MR. WEINER: But, Your Honor--

THE COURT: --on the cross-claims of Elizabeth and Charles Willis.

MR. WEINER: Your Honor, the question is, they're asking for a legal conclusion: Was she an

accommodation party? And the Court in D. C. resolved that issue. Now--I mean, as between Elizabeth and Charles, the only two people on those notes.

Now, I don't know how Counsel can ask a party to take a position contrary to what the Court in a case where they have jurisdiction has found.

THE COURT: I don't know whether Counsel agrees with that Court. All I'm saying is, The Cleveland Trust Company was not party to it. Accordingly, I am not bound to accept it as res judicata or collateral estoppel or whatever you want to call it."

(3)

Supreme Court, U.S.
FILED
JUN 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1822

In The
Supreme Court of the United States
October Term, 1985

CHARLES F. WILLIS, JR.,
Petitioner,

v.

THE CLEVELAND TRUST COMPANY
n/k/a AmeriTrust Company,
Executor of the Estate of
Harvey S. Firestone, Jr., Deceased

and

ELIZABETH FIRESTONE WILLIS,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Article IV, Section 1, of the Constitution of the United States (Full Faith and Credit Clause) is implicated in a case in which both of the following are true:

(1) The propositions that Petitioner now claims violate the Full Faith and Credit Clause of the Constitution of the United States were conclusively established for purposes of this lawsuit by Petitioner's failure to timely respond to Requests for Admission properly served upon him pursuant to the Ohio Rules of Civil Procedures; and

(2) Respondent, The Cleveland Trust Company, was not a party to the earlier District of Columbia action relied upon by Petitioner nor was it in privity with any entity that was a party to that action.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

—o—

SUMMARY OF ARGUMENT

Respondent, The Cleveland Trust Company (hereinafter "Cleveland Trust") respectfully submits that there are at least two reasons that the writ of certiorari sought in this case should be denied. First, there was an adequate, independent state ground of decision which bars this Court from reviewing petitioner's claim based upon Article IV, Section 1, of the Constitution of the United States. Second, petitioner's claim is founded upon a premise that respondent Cleveland Trust was in privity with respondent Elizabeth Firestone Willis in connection with previous litigation that occurred between petitioner and Mrs. Willis in the Federal District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia and that premise is erroneous.

—o—

ARGUMENT STATING REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

(1) Adequate, Independent State Ground of Decision

It has long been established that a claim cannot be the basis for a proceeding before this Court unless that claim was properly raised and denied by the supreme court of the state in which the cause originated. As explained by this Court many years ago:

> This means that the claim must be asserted at the proper time and in the proper manner by pleading,

> motion, or other appropriate action under the state system of pleading and practice . . ., and upon the question whether or not such a claim has been so asserted the decision of the state court is binding upon this court, ...

Atlantic Coast Line Railroad Company v. Mims, 242 U.S. 532, 535 (1917) (citations omitted).

The petitioner's position in this case is that the Ohio Courts violated the Full Faith and Credit Clause by finding facts that assertedly had been found differently in a previous case before the Federal Courts of the District of Columbia. As noted by the petitioner, the basis for the Ohio Courts' findings was petitioner's admission of the facts at issue through his failure to timely respond to Requests for Admission that had been properly served upon him pursuant to Rule 36 of the Ohio Rules of Civil Procedure. *Petition For Writ of Certiorari* at 14-15. (Rule 36 is reproduced as an appendix to this Brief.)

As stated by the Ohio Supreme Court in its decision in this case, Rule 36 of the Ohio Rules of Civil Procedure requires that a party respond to Requests for Admission served upon him, within the time designated, by either answering or objecting. If he does neither, the requests become admissions and may only be withdrawn under compelling circumstances. *The Cleveland Trust Company v. Willis*, 20 Ohio St. 3d 66, 67 (1985) (Appendix to Petition For Writ of Certiorari 1, 5). As stated by petitioner, he first raised the alleged *res judicata* effect of the District of Columbia actions, not in timely responses to Cleveland

Trust's Requests for Admission, but after the trial court had refused to let him file his untimely responses to Cleveland Trust's Requests for Admission. *Petition For Writ of Certiorari* at 16. At that point, it was too late. The facts he now asserts the Ohio Courts were precluded from relitigating by the District of Columbia decisions, were already "conclusively established" for purposes of this case. His admission of those facts could have been withdrawn only under compelling circumstances.

The Ohio Supreme Court analyzed the circumstances surrounding petitioner's failure to comply with Rule 36 of the Ohio Rules of Civil Procedure and found that the record disclosed "plain failure to respond to the requests without justification for the delay." Accordingly, it found that the trial court had not abused its discretion in refusing to permit petitioner to withdraw or amend his admissions and that judgment was properly entered against him. *The Cleveland Trust Company v. Willis*, 20 Ohio St. 3d 66, 68 (1985) (Appendix to Petition For Writ of Certiorari 1, 8). In effect, the Ohio Supreme Court found that petitioner had not raised his *res judicata* claim "at the proper time and in the proper manner." *See Atlantic Coast Line Railroad Company v. Mims*, 242 U.S. 532, 537 (1917).

The Ohio Court's refusal to let petitioner deny, or object to, the Requests for Admission because of his failure to comply with Rule 36 of the Ohio Rules of Civil Procedure, constitutes an adequate, independent state ground of decision which bars this Court from reviewing petitioner's claim based upon Article IV, Section 1, of the Constitution of the United States. His Petition For Writ of Certiorari, therefore, should be denied.

(2) Cleveland Trust Was Not In Privity With Elizabeth Firestone Willis In Connection With The District Of Columbia Action

During 1978, petitioner named Cleveland Trust as a defendant in a lawsuit that he had earlier, during 1976, filed against Elizabeth Firestone Willis in the United States District Court for the District of Columbia. Although Cleveland Trust timely moved for dismissal of the claim against it based upon the District of Columbia District Court's lack of personal jurisdiction over it, that motion was denied. The United States Court of Appeals for the District of Columbia, however, subsequently reversed the District Court's decision on the personal jurisdiction question and petitioner's Complaint, as it related to Cleveland Trust, was dismissed. *Petition For Writ of Certiorari* at 8-9. The District of Columbia action, as it related to Cleveland Trust, therefore, was a nullity. *See Industrial Credit Company v. Berg,* 388 F.2d 835, 842 (8th Cir. 1968).

Despite the fact that Cleveland Trust was not properly a party to the District of Columbia action, petitioner argues that that action has a *res judicata* effect upon claims between him and Cleveland Trust in this case. Specifically, petitioner asserts by his Petition For Writ of Certiorari that Cleveland Trust was in privity with Mrs. Willis, who was properly a party to the District of Columbia action, and, that as a result of that privity, was foreclosed from litigating certain of the facts that were admitted by petitioner through his failure to timely respond to its Requests for Admission. Even if petitioner had timely raised his *res judicata* argument, through objec-

tions to, or denials of, Cleveland Trust's Requests for Admission, however, the Ohio Courts would have been acting appropriately in rejecting it.

As stated by the United States Court of Appeals for the District of Columbia, and quoted by petitioner:

> [Privity] designates a person so identified in interest with a party to former litigation that he represents precisely the same legal right in respect to the subject matter involved.

Jefferson School of Social Science v. Subversive Activities Control Board, 331 F.2d 76, 83 (D.C. Cir. 1963) (citations omitted), quoted, *Petition For Writ of Certiorari* at 27. A key element of this required identity of interest is that the party sought to be foreclosed by the previous litigation must have, with rare exceptions, acquired its interest in the subject matter during or after the previous litigation. *Chase National Bank v. Norwalk,* 291 U.S. 431, 438-439 (1933); *Old Colony Trust Company v. Omaha,* 230 U.S. 100, 122 (1913). As noted by this Court in *Chase National Bank v. Norwalk:*

> [I]n every case where a[n] [interest] was [acquired] before the [previous] litigation . . . was instituted, the [party sought to be foreclosed] is entitled to have a decision determining his rights rendered on the basis of the facts and considerations adduced by him.

291 U.S. at 438.

Consideration of the circumstances of this case demonstrates why the above quoted rule exists. As is clear from the Summary of Facts furnished by petitioner, prior to

1969, Mrs. Willis occupied two roles in connection with the series of notes that preceded the 1969 note to the Firestone Bank. First, she was the owner, or part owner, of certain stock that was pledged as collateral for those notes. *Petition For Writ of Certiorari* at 5-6. Second, she served as a signer of those notes, whether it was as an accommodation party or as a maker. *Petition For Writ of Certiorari* at 6. With the signing of the 1969 note, Mrs. Firestone was replaced in her role as a signatory to the series of notes by her father, Cleveland Trust's decedent. She continued thereafter, however, in her role as the owner, or part owner, of the stock that had been pledged as collateral for the notes. *Petition for Writ of Certiorari* at 7.

At the time petitioner instituted the District of Columbia action against Mrs. Willis, she no longer had any motivation to contend that her role on the series of notes was that of an accommodation party as opposed to a comaker. In fact, it became clear during the litigation of this case before the Ohio trial court, that it was to Mrs. Willis' financial advantage as the owner or part owner of stock pledged as collateral for the 1969 note to argue that her father, as her replacement on that note, served as a comaker instead of an accommodation party. This was exactly opposite Cleveland Trust's position. If Mr. Firestone was a comaker of the 1969 note, Cleveland Trust would have only been entitled to a judgment for one-half of the amount it was called upon to pay in satisfaction of the 1969 note; since the Ohio courts found that Mr. Firestone was an accommodation party, Cleveland Trust recovered judgment in the full amount it had been called upon to pay. Inasmuch as Mrs. Firestone's interest in the

pledged stock was subject to the judgment in Cleveland Trust's favor, it would have been to her advantage for Cleveland Trust to have failed on the accommodation party issue. Clearly, at the time of the District of Columbia action, Mrs. Willis did not represent precisely the same legal right as Cleveland Trust holds in respect to the subject matter involved in this case.

Inasmuch as Cleveland Trust's decedent acquired his interest in the subject matter of the District of Columbia action a number of years prior to the filing of that action, Cleveland Trust was not foreclosed in this case from litigating any issues previously decided in that District of Columbia action. Even if there were not an adequate, independent state ground for decision in this case, therefore, the decision of the Supreme Court of Ohio would not be in violation of the Full Faith and Credit Clause of the Constitution of the United States.

———o———

CONCLUSION

There was an adequate, independent state ground of decision in this case which bars this Court from reviewing petitioner's claim based upon Article IV, Section 1, of the Constitution of the United States. Further, even if there were not an adequate, independent state ground for decision, the decision of the Supreme Court of Ohio would be correct because Cleveland Trust was not properly a party to the action before the United States District Court for the District of Columbia and was not in privity with anybody who was properly a party to that action. Ac-

cordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Rule 36 of The Ohio Rules of Civil Procedure

RULE 36. REQUESTS FOR ADMISSION

(A) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(B) set forth in the request, that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within a period designated in the request, not less than twenty-eight days after service thereof or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial

shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer, or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(C), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move for an order with respect to the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Rule 37(A)(4) apply to the award of expenses incurred in relation to the motion.

(B) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing

modification of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

(C) Form of Answers and Objections to Requests for Admissions. The party submitting requests for admissions shall arrange them so that there is sufficient space after each request for admission in which to type the answer or objections to that request for admission. The minimum vertical space between requests for admissions shall be one inch.